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In The

Supreme Court of the United States

October Term, 1995

WILLIAM J. SCHULTE, M.D., *et al.*,

Petitioners,

versus

WOODROW SMITH,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the punitive exaction approved in this case violates the Due Process Clause of the Fourteenth Amendment, given the failure of the trial court and the appellate court to conduct meaningful and adequate reviews of the excessiveness of the punitive damages verdict in compliance with this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991), and given the presumption of correctness afforded the jury's $4.5 million verdict.

2. Whether the Alabama Supreme Court's retroactive application of its holding overturning a statutory punitive damages cap violates the Due Process Clause of the Fourteenth Amendment.

3. Whether Petitioners' right to a fair tribunal guaranteed by the Due Process Clause of the Fourteenth Amendment was denied because a justice who previously and publicly had expressed views hostile to the position of Petitioners failed to recuse herself.

LIST OF PARTIES

The parties to the proceedings before this Court are the petitioners William J. Schulte, M.D., and Pulmonary Associates of Mobile, P.A., and the respondent Woodrow Smith.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners William J. Schulte, M.D., ("Dr. Schulte"), and Pulmonary Associates of Mobile, P.A., ("Pulmonary Associates"), respectfully petition for a writ of certiorari to review the judgment of the Alabama Supreme Court entered in this case on December 15, 1995.

OPINIONS BELOW

The order of the Circuit Court of Mobile County (App. 50, *infra*), is unreported. The opinion of the Alabama Supreme Court (App. 1, *infra*), is not yet reported. The Alabama Supreme Court's denial of Petitioners' application for rehearing (App. 71, *infra*), is not reported.

JURISDICTION

The decision of the Alabama Supreme Court denying Petitioners' application for rehearing was entered on December 15, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . . "

STATEMENT OF THE CASE

This case involves a medical malpractice claim filed by Plaintiff Woodrow Smith, as the Administrator of the Estate of Annie Jo Smith, deceased, against Dr. Schulte and his group, Pulmonary Associates.[1] [C. 1, 34].[2] Plaintiff claimed that Dr. Schulte committed malpractice in the care and treatment of Mrs. Smith while she was hospitalized for injuries suffered in an automobile accident. Any liability of Pulmonary Associates is derivative under the doctrine of respondeat superior.

Mrs. Smith was involved in a head-on collision and suffered multiple injuries and fractures and possible heart and lung contusions. [R. 593-595].[3] Besides her other injuries, at the time of her admission to the hospital, Mrs. Smith was experiencing difficulties breathing and had fluid collecting in her upper left lung. A chest x-ray showed that she had suffered a total collapse of her left lung. Although the admitting physician treated Mrs. Smith for these pulmonary problems, her condition did not improve.

Dr. Schulte, board-certified in Internal Medicine, Pulmonology, and Critical Care, first saw Mrs. Smith two days after her accident. At that time, Mrs. Smith had pneumonia, infection in the lungs, a flail chest, [R. 408],

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[1] Knollwood Park Hospital was named as a co-defendant but was given a directed verdict and is not a party to this petition.

[2] The designation "C. ___" refers to the Clerk's Transcript of the proceedings below.

[3] The designation "R. ___" refers to the Reporter's Transcript of the proceedings below.

and Adult Respiratory Distress Syndrome (ARDS) – a serious, life-threatening condition that can develop from blunt-force trauma such as an automobile accident. [R. 232, 618]. Dr. Schulte also observed that Mrs. Smith was anxious and having difficulty breathing. Dr. Schulte ordered blood gases to determine Mrs. Smith's lung functioning and reviewed Mrs. Smith's chest x-rays and medical records. After receiving the blood gas report and reviewing the x-rays, Dr. Schulte decided to place a Swan-Ganz catheter to check Mrs. Smith's fluid status and also asked the hospital staff to prepare for a possible intubation to place Mrs. Smith on a ventilator.

In placing the Swan-Ganz catheter, Dr. Schulte first placed the needle in the right subclavian vein (just beneath the collarbone), but noted air bubbles, indicating that he may have punctured the lung, a recognized complication of catheter placement. Dr. Schulte then placed the Swan-Ganz in an alternative location.

The readings from the Swan-Ganz catheter indicated that Mrs. Smith's fluid levels were acceptable. This, in turn, indicated that her breathing problems were not the result of excessive fluid. Accordingly, it was clear that intubation was required and that Mrs. Smith would not survive without it.

Dr. Schulte visualized the vocal cords, placed the tube down into the trachea, saw the tube go through the vocal cords, and heard air come back through the tube, all indicating without doubt that the tube was properly placed in the trachea. [R. 272, 330]. However, at the time of the intubation, Mrs. Smith was combative, fighting and rocking back and forth. [R. 274]. Dr. Schulte tried to hold

the tube in place during her fighting and asked the nurse to give a paralyzing drug, Pavulon, to Mrs. Smith. During the struggle, the tube apparently came out of the trachea and dropped back into the esophagus.

As soon as the Pavulon was administered, Mrs. Smith's blood pressure started dropping, and a code situation developed. [R. 283]. The ABCs of emergency resuscitation are **A**irway, **B**reathing, and **C**irculation. In Dr. Schulte's judgment, he had **A** – an airway. A respiratory therapist was bagging Mrs. Smith, so Dr. Schulte had **B** – breathing. Concerned that the air bubbles seen on the initial subclavian stick in the placement of the Swan-Ganz catheter had resulted in a collapsed lung and concerned that the lung had collapsed against the heart (a tension pneumothorax), Dr. Schulte focused on **C** – Mrs. Smith's circulatory problem. [R. 374, 386]. Dr. Schulte placed a needle in the chest to relieve the collapsed lung, [R. 284, 374], and heard a rush of air come out of the lung, confirming that Mrs. Smith indeed had experienced a collapsed lung. [R. 374].

While placing the needle in the chest, Dr. Schulte saw gastric contents in the intubation tube, which indicated that the tube had dropped into the esophagus. Dr. Schulte immediately removed the old tube and placed a new tube. [R. 382]. Mrs. Smith, however, did not regain consciousness after these events. She developed multi-system organ failure and died five days later. The autopsy revealed that at the time of death Mrs. Smith had ARDS, multiple clots in the lungs, pneumonia, and had both fat and bone marrow emboli in the lungs. ARDS itself has a mortality rate of 65-90%.

In his ensuing medical wrongful death action, Plaintiff claimed that Dr. Schulte negligently and wantonly passed an endotracheal tube into the esophagus and allowed it to stay there for a period of time so that it produced brain damage and cardiac arrest. Before trial, Plaintiff filed a motion to declare Alabama Code § 6-5-547 unconstitutional. Part of a package of tort-reform legislation, § 6-5-547 placed a cap on the amount of a punitive damages judgment in medical wrongful death actions. The trial court denied Plaintiff's motion.

At trial, the jury returned a verdict against Dr. Schulte and Pulmonary Associates and in favor of Plaintiff in the amount of $4.5 million. Immediately following the trial, the trial court decided to reconsider the constitutionality of Alabama Code § 6-5-547 and set a hearing to address the issue. Thereafter, the trial court entered judgment in the amount of $4.5 million.

Petitioners filed a timely motion for judgment notwithstanding the verdict or in the alternative to alter or amend judgment or for new trial or remittitur. [C. 829]. The trial court held its final hearing on November 5, 1993, and the parties again argued the constitutional issues and the post-judgment motions, including those concerning the verdict's excessiveness. [R. 1235-1276]. The trial court denied Plaintiff's motion to declare § 6-5-547 unconstitutional and denied Petitioners' post-judgment motions. (App. 69-70, *infra*). The trial court held that the $4.5 million award was not excessive but was limited by the statutory cap and entered judgment against the Petitioners for $1,276,873, the amount of the cap as adjusted, pursuant to the statute, for increases in the Consumer Price Index. *Id.*

Plaintiff filed an appeal from that part of the trial court's judgment denying the motion to declare § 6-5-547 unconstitutional. Thereafter, Petitioners filed a cross-appeal from that portion of the trial court's order denying their post-judgment motions. [C. 1077].

Petitioners also filed a Request for Recusal with the Alabama Supreme Court asking that then Chief Justice Sonny Hornsby and Justice Janie L. Shores recuse themselves. Chief Justice Hornsby was asked to recuse himself because of his role in the tort-reform legislation package of which § 6-5-547 was a part. Justice Shores was asked to recuse herself because she had previously authored a law review article in which she voiced her belief that the tort-reform legislation was unjustified by empirical evidence. Neither the supreme court nor either of the justices issued a ruling on Petitioners' recusal motion.

On appeal, Petitioners advanced points of error objecting to (1) the excessiveness of the verdict in light of *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991); (2) the failure of the trial court to conduct a post-trial excessiveness review consistent with the Due Process Clause; and (3) the trial court's reversible errors in the conduct of the trial. Petitioners further urged the court to remand the case for consideration of remittitur without the constitutional infirmities of the trial court's excessiveness review, or to remand the case with instructions to enter judgment in a significantly reduced amount. Petitioners also argued that retroactive application of a finding striking down the punitive damages cap would be constitutionally infirm.

On August 18, 1995, the Alabama Supreme Court issued a per curiam opinion declaring § 6-5-547 unconstitutional. (App. 1, *infra*). Chief Justice Hornsby took no part in the decision. Justice Shores, however, was one of only two justices concurring in all respects in the per curiam opinion. (App. 28, *infra*). Besides the unconstitutionality ruling, the supreme court held that the jury's original $4.5 million verdict was excessive and that a remittitur of $2 million was appropriate in light of the court's abbreviated excessiveness review.

In their Application for Rehearing, Petitioners argued that the court erred (1) in failing to conduct an adequate excessiveness review of the verdict, (2) in applying the finding of unconstitutionality retroactively, and (3) in allowing Justice Shores to participate in the court's decision on the case. Over the dissent of three justices, the Alabama Supreme Court overruled the application without comment on December 15, 1995. (App. 71, *infra*).

REASONS FOR GRANTING THE PETITION

This petition is due to be granted because the decision of the Alabama Supreme Court herein (1) conflicts with the mandates of this Court set forth in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991), (2) denies Petitioners due process by retroactively applying a ruling on the unconstitutionality of a statute, and (3) violates Petitioners' right to a fair tribunal.

In addition, the Court has granted certiorari in *BMW of North America, Inc. v. Gore*, 646 So. 2d 619 (Ala. 1994),

cert. granted, ___ U.S. ___, 115 S. Ct. 932, 130 L. Ed. 2d 879 (1995), to consider whether the punitive award in that case is so excessive as to violate due process. The present petition also challenges the efficacy of Alabama's review of the excessiveness of a punitive damages award, and the Court's decision in *Gore* may bear on the issues presented herein.

Accordingly, the Court should either grant this petition for consideration of the issues unique to this case or hold it for disposition as appropriate in light of the pending decision in *Gore*. *See* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* § 4.16 at 192-93 (7th ed. 1993).

I. Unconstitutional Punitive Damages Review

A. Excessiveness Review

Haslip presupposes "a meaningful and adequate review by the trial court," *id.* at 20, 111 S. Ct. at 1044, 113 L. Ed. 2d at 21, which includes consideration of the relevant *Hammond/Green Oil* factors[4] and further

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[4] This Court approved and mandated consideration of the following elements (taken from *Hammond v. Gadsden*, 493 So. 2d 1374 (Ala. 1986) and *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989)) in a post-trial excessiveness review:

(1) whether a reasonable relationship exists between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred;

(2) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct;

presupposes an independent review by the appellate court that includes an analysis of comparable cases and a detailed substantive review, *id.* at 21, 111 S. Ct. at 1045, 113 L. Ed. 2d at 21-22. Due process requires consideration of each and every mitigating factor to ensure that there is "sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages." *Id.* at 22, 111 S. Ct. at 1045, 113 L. Ed. 2d at 22. However, the excessiveness reviews conducted by both the trial court and the Alabama Supreme Court in this case fail to meet the requirements of *Haslip*, and Alabama's post-trial excessiveness review, which affords a presumption of correctness to the jury verdict and then to the trial court's determination, fails to comport with due process.

Comparable cases. Both the trial and appellate reviews failed to consider comparable cases. The trial court did not consider *comparable* cases, and the supreme court did not consider *any* cases. In particular, neither review considered other comparable medical wrongful death cases. Due process requires consideration of the fact that the

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(3) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss;

(4) the financial position of the defendant;

(5) all the costs of litigation;

(6) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and

(7) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Id. at 21-22, 111 S. Ct. at 1045, 113 L. Ed. 2d at 21-22.

award, even after remittitur, remains the third highest verdict ever awarded against a healthcare provider in any reported Alabama case and that both instances of higher verdicts involved circumstances starkly different from this case. Due process requires consideration of the fact that, at the time this matter was submitted to the supreme court,[5] the average award in the recent reported Alabama medical wrongful death cases was approximately $1.5 million, and the median award in such cases was $600,000.

The highest award against a healthcare provider ever approved in Alabama, $6.875 million, was based upon truly egregious conduct without parallel to the circumstances of this case. *See Atkins v. Lee*, 603 So. 2d 937 (Ala. 1992). In *Atkins*, a new medical resident undertook an unsupervised surgical procedure on a young child; ignored the advice and warnings of two nurses for fear of alerting his supervising physician to his unauthorized performance of the procedure; falsely informed his supervising physician, once difficulties had developed, that the procedure had gone well; and attempted to perpetuate his deception following the patient's fatal cardiac arrest.

Moreover, for the jury verdict in this case to be comparable to the award approved in *Atkins*, Petitioners

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[5] Since submission, the average award has decreased. In *Sweeney v. Purvis*, 665 So. 2d 926 (Ala. 1995), the most recent reported Alabama case affirming a medical wrongful death verdict, the supreme court upheld a $500,000 jury verdict. The defendant doctor, who had been advised of a possible blood clot in the patient, nevertheless ordered that she undergo scheduled physical therapy. The doctor issued this order by telephone and without ever examining the patient for the possible clot.

would have to have assets exceeding $26 million and annual net incomes exceeding $6 million. For the remitted award to be comparable to *Atkins*, Petitioners would have to have assets of more than $14.5 million and annual net income of more than $3.6 million. This is not the case; the amount approved here after remittitur is well above the award approved in a case involving gross, intentional, and fraudulent conduct. If Dr. Schulte and Pulmonary Associates had received a review in accord with due process, the award approved necessarily would be much lower than even the remitted award.

Financial position of the defendant. The supreme court's excessiveness review is also deficient because its analysis of the financial impact on Petitioners is incomplete. Although it discusses the burden on the professional association, the court does not consider the impact of the verdict on Dr. Schulte individually. Because his professional association is responsible only under the doctrine of respondeat superior, and because he is jointly *and severally* liable under Alabama law for the entire award, Dr. Schulte could be solely responsible for the entire excess award. The complete failure to consider the award's impact on Dr. Schulte individually is a violation of his due process rights.

In addition, the supreme court review looked at gross receipts instead of the *net* income stream of the professional association. The association necessarily must pay such business expenses as salaries, taxes, benefits, occupancy and equipment costs, and office expenses. In comparing the excess verdict with gross receipts, the court used a much-inflated sum which is not realistically available for satisfaction of a judgment. Use of gross-receipts

figures blindly penalizes Petitioners excessively, thereby denying them due process.

The verdict approved in *Alabama Power Co. v. Turner*, 575 So. 2d 551 (Ala.), *cert. denied*, 500 U.S. 953, 111 S. Ct. 2260, 114 L. Ed. 2d 713 (1991), is instructive in this regard. In *Turner*, a wrongful-death action involving an electrocution, the defendant admitted that the $5 million verdict against it would have had no adverse financial impact on the defendant; the supreme court nonetheless remitted the judgment to $3.5 million. Here, in a case involving a doctor and his group (composed of only three other doctors), an adequate review of this judgment's potentially devastating financial impact dictates that the verdict be remitted significantly more than the one in *Turner*. The glaring disparity between the treatment of the defendant in *Turner* and the treatment of Petitioners here demonstrates that the verdict in this case exceeds what is needed to accomplish society's goals.

The supreme court's review also is anomalous in that it considers Petitioners' liability insurance coverage only as a setoff to be subtracted from the verdict before the impact of the verdict can be assessed. Although liability insurance coverage has been cited as an element in evaluating whether a defendant's assets are insufficient to pay a judgment, the supreme court's review unjustifiably utilized the liability insurance in a manner that penalizes Petitioners for having obtained an aggregate of two million dollars in insurance protection.[6] By implicitly holding that a defendant's personal assets must be put at risk

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[6] The supreme court's improper consideration of liability insurance coverage means that a medical professional *never*

before the goals of the wrongful death statute can be met, the supreme court all but eliminates the primary reason to seek the protection of liability insurance. Applying the amount of a defendant's liability insurance to "reduce" the amount of a judgment before considering the financial impact of the judgment on the defendant does not comport with due process.

Profitability of the wrongful conduct. Contrary to the requirements of *Haslip*, the reviews did not consider the lack of profitability of the allegedly wrongful conduct.[7] Any mitigating factor indicating that an award is excessive must be considered and must be expressly considered to ensure meaningful and adequate review.

Reprehensibility and duration of the conduct. The reviews failed to consider that the conduct complained of was alleged negligence. The punitive damages awarded here were awarded for allegedly *negligent* conduct, and consequently, the degree of culpability in this case is necessarily a mitigating factor. The supreme court's review, however, improperly focused attention only on the helplessness of Mrs. Smith in assessing the degree of harm. The review creates an incongruent situation in which a defendant would be better off if the decedent died instantaneously, and it ignores the fact that Dr. Schulte was addressing what he reasonably considered a more serious and life-threatening problem during the

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could purchase sufficient insurance to protect his personal assets.

[7] There is no dispute that the intubation was essential and that Mrs. Smith would not survive without it. It was not an elective procedure.

moments before he discovered that the tube had become displaced into the esophagus. The time period was very brief, and Dr. Schulte certainly was not standing idly by.

The supreme court's factual rendition and discussion of the threatened harm also imply that placement of the endotracheal tube in the esophagus amounts to a breach of the standard of care. This is not so. The malpractice claimed at trial was not incorrect placement, but a delay of a matter of moments in confirming what initially – before the patient's struggling – was a good placement. The malpractice claimed here was the exercise of judgment by a physician actively trying to save the life of a woman severely injured in a head-on collision.

Finally, although a Los Angeles doctor did testify that Dr. Schulte breached the standard of care in failing to recognize the transposition of the tube more quickly, the excessiveness review must not ignore the fact that three well-qualified pulmonologists testified that Dr. Schulte did *not* breach the standard of care. Dr. Schulte and his group are being *punished* for conduct that other members of the medical profession cannot agree was either in compliance with or in breach of the standard of care.

B. Alabama's "Independent Review"

Not only did the Alabama courts fail to properly conduct the *Hammond/Green Oil* review intended to guarantee Petitioners' due process rights, the post-trial review actually provided under Alabama law and in this case does not comport with the independent post-trial review this Court perceived to exist when it decided *Haslip*. The perception may have been that Alabama's review was constitutional; the reality is otherwise.

Haslip contemplates a review that will "ensure that the award does 'not exceed an amount that will accomplish society's goals of punishment and deterrence,' " *id.* at 20, 111 S. Ct. at 1045, 113 L. Ed. 2d at 22, and that will make "certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Id.* Alabama's post-trial review, however, does not meet these constitutional requirements because Alabama law dictates that the trial court give the jury verdict a presumption of correctness. It further dictates that the presumption of correctness is *heightened* if the trial court approves the award.[8] This is not the independent review contemplated in *Haslip*.

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[8] As Justice O'Connor has noted:

> The [Alabama] Supreme Court insists that a jury's award of punitive damages carries a 'presumption of correctness' that a defendant must overcome before remittitur is appropriate.
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> . . . .
>
> Relying on the trial judge's refusal to disturb the verdict, the [Alabama] Supreme Court afforded it a double dose of deference, stating that 'jury verdicts are presumed correct, and that presumption is strengthened when the presiding judge refuses to grant a new trial.'

Haslip, 499 U.S. at 56, 57, 111 S. Ct. at 1063, 113 L. Ed. 2d at 44, 45 (O'Connor, J., dissenting) (citations omitted).

Moreover, shortly after *Haslip*, the Alabama Supreme Court struck down Alabama Code §§ 6-11-23 and 6-11-24, which had attempted to change Alabama law by directing that no presumption of correctness attach to an award of punitive damages. *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d 414 (Ala. 1991).

Haslip approves consideration of the *Hammond/Green Oil* factors. If these factors are considered by the trial court only in the light of a presumption of correctness, the review is skewed. If these factors are considered by the appellate court only in light of a heightened presumption of correctness, the review is further skewed. In either event, due process is not satisfied. If an analysis of comparable cases, an examination of the *Hammond/Green Oil* factors, and consideration of society's goals are appropriate parts of constitutional post-trial review of punitive damages, they must be reviewed without any presumption of correctness. The jury does not have this information; its verdict *cannot* be presumed to be correct.

Moreover, *Haslip* contemplates a review that ensures that the award *does not exceed* the amount necessary. By contrast, Alabama's review contemplates letting the award stand unless it is so excessive as to be "plainly and palpably wrong and unjust." *Continental Eagle Corp. v. Mokrzycki*, 611 So. 2d 313, 322 (Ala. 1992). In effect, Alabama's excessiveness standard identifies the *most* egregious conclusion the jury could have reached from the evidence or the inferences therefrom and, ignoring the totality of the evidence, uses that standard as its benchmark for excessiveness. Alabama's review contemplates letting the award stand unless it is so excessive as to be the result of bias, passion, prejudice or other improper motive. *See, e.g., Gulf Atl. Life Ins. Co. v. Barnes*, 405 So. 2d 916, 925 (Ala. 1981). At bottom, Alabama's review asks, "What is the *highest* award that can be approved?" This is improper and constitutionally infirm. Indeed, this Court acknowledged in *Haslip* that Vermont's

standard – "manifestly and grossly excessive" – and Mississippi's standard – "passion, bias, and prejudice . . . so as to shock the conscience" – are faulty. *Haslip*, 499 U.S. at 20 n.10, 111 S. Ct. at 1045 n.10, 113 L. Ed. 2d at 22 n.10. Alabama's excessiveness standard, likewise, is faulty.

The imprimatur this Court placed on Alabama's excessiveness review process demands reconsideration because Alabama courts are failing to abide by the standards enunciated in *Haslip*. Justice Hugh Maddox of the Alabama Supreme Court has summed it up well:

> It is frequently said that persons should rely more on what a person *does* than upon what he *says*. What this court has *done*, especially since *Haslip* was released, shows that the procedure found in *Haslip* to be meaningful and adequate may not be.
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> . . . .
>
> I think that the Supreme Court of the United States may have been led to believe that a type of "independent review" was occurring, when in fact it was not, and is not, occurring.

Southern Life & Health Ins. Co. v. Turner, No. 88-1289, slip op. 2, 4 (Ala. Sept. 11, 1991) (Maddox, J., dissenting) (on denial of stay of judgment) (App. 121-22, 123-24, *infra*).

In sum, Alabama's post-trial review of punitive damages awards does not pass constitutional muster. A presumption of correctness and a heightened presumption of correctness are inappropriate and unconstitutional. Only a truly independent review can preserve the constitutional guarantees afforded Petitioners by the Due Process Clause. As conducted in both the trial court and on

appeal, the review in this case was inaccurate and incomplete and therefore unconstitutional. The verdict, as remitted in this case, remains excessive. The excessiveness review as practiced in Alabama "is an empty exercise in rationalization that creates only the appearance of evenhanded justice." *Haslip*, 499 U.S. at 57, 111 S. Ct. at 1064, 113 L. Ed. 2d at 44, 45 (O'Connor, J., dissenting). Petitioners were entitled to an adequate and independent review at both the trial court level and the appellate level. That review was denied them in both courts.

II. Inappropriate Retroactive Application

"The actual existence of a statute, prior to . . . a finding [of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored." *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374, 60 S. Ct. 317, 318, 84 L. Ed. 329, 332-33 (1940). This Court has refined the quoted principle and established a three-part analysis to assess the propriety of retroactively applying a judicial decision. *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971). First, the court must determine whether the decision establishes a new principle of law, either by overruling past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, the court must weigh the merits of each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Third, the court must weigh the inequity imposed by retroactive application of the decision. *Id.* at 106-07, 92 S. Ct. at 355, 30 L. Ed. 2d at 306.

Application of the *Chevron Oil* analysis reveals that the supreme court's retroactive application of its finding that § 6-5-547 was unconstitutional was improper. Section 6-5-547 was, until that ruling, a valid law which enjoyed a presumption of constitutionality. In holding § 6-5-547 unconstitutional, the supreme court created a new constitutional right – the right to be free from fatal medical malpractice – to justify application of an only recently-created equal protection standard of scrutiny under Alabama law.[9] To establish its alternate basis of unconstitutionality, that § 6-5-547 denied the right to a jury trial, the court relied on tortured constructions of its own precedents, which resulted in the implicit overruling of countless other decisions. In short, the supreme court's ruling was unprecedented and unforeseeable and announced a new rule of Alabama constitutional law.

Nothing about the ruling dictates retroactive application. The court's purported justification for declaring the statute unconstitutional is to prevent (1) the valuing of a human life by the legislature and (2) the denial of a jury trial by the legislature. Given that the statutory damages cap no more assigned a value to a human life or denied a jury trial than the supreme court's conclusion that the verdict should be $2.5 million rather than $4.5 million, retroactive or prospective application is wholly irrelevant to the realization of the stated purpose of the new rule.

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[9] Alabama's constitution has no express equal protection clause, *see, e.g., Smith v. Schulte* (App. 31, *infra*) (Maddox, J., dissenting); the equal protection analysis employed here was cobbled together by the plurality in *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991).

Moreover, because the purpose of any wrongful death action in Alabama is to punish and deter others and not to compensate survivors, no plaintiff has any expectation of or right to compensatory damages. *See, e.g., Maryland Cas. Co. v. Tiffin*, 537 So. 2d 469, 471 (Ala. 1988).

Finally, retroactive application of the unconstitutionality ruling would be grossly inequitable to Petitioners and the other healthcare providers who relied on § 6-5-547 before the supreme court's decision. Healthcare providers like Petitioners were encouraged to undertake the provision of healthcare to critically ill patients, and potential defendants in the healthcare community were given the protection of the cap and its assurance that they, inter alia, could structure their insurance limits at least in part with that protection in mind. Additionally, the cap's existence, as well as the trial court's denial of Plaintiff's motion to declare § 6-5-547 unconstitutional, necessarily played a role in Petitioners' settlement considerations.

The Due Process Clause serves to protect Petitioners from the arbitrary finding that the statute on the books at the time of the conduct complained of is now, more than six years later, inapplicable. This is especially so because the remedy here is punitive in nature. The finding of unconstitutionality must not be applied retroactively to punish Petitioners in an amount that is well beyond the punishment that was the maximum at the time of the acts complained of. Such a result would be neither just nor constitutional.

III. A Biased Tribunal

Justice Shores' participation in the supreme court's decision violated Petitioners' right to a fair tribunal as guaranteed by the Fourteenth Amendment. A principal issue for decision by the supreme court was the constitutionality of Alabama's punitive damages cap in medical wrongful death suits. Plaintiff claimed that the cap violated his equal protection rights under the Alabama Constitution of 1901, and the Alabama Supreme Court conducted some less than fully articulated balancing test in which it examined "whether the connection between the benefit sought to be conferred on society and the means employed to accomplish it, when weighed against the inequalities created by the statute's classifications, is so attenuated and remote as to constitute an unreasonable exercise of police power." (App. 11, *infra*) (quoting *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 167 (Ala. 1991)).

The damages cap was part of a package of tort reform legislation enacted for the express purpose of improving the accessibility of medical services in the State of Alabama. In sum, the Alabama Legislature determined that (1) a crisis threatened the delivery of medical services, and (2) the threat of malpractice litigation increased costs and decreased the availability of health care. *See* ALA. CODE § 6-5-540 (1993). On appeal, Plaintiff argued:

> [T]here was and is no empirical evidence that placing a cap on wrongful death damages has any effect whatsoever on (1) health care costs, (2) the plight of those who can least afford health care, (3) the number of unnecessary medical procedures, (4) the availability of essential

> medical services, or, (5) the number of physicians providing specialized healthcare in this state. In fact, the empirical evidence, both at the time the Legislature enacted § 6-5-547 and since, indicates quite the contrary.

Brief for Plaintiff/Appellant/Cross-Appellee at 38, *Smith v. Schulte*, ___ So.2d ___ (Ala. 1995) (Nos. 1930362 and 1930459). In his reply brief, Plaintiff argued:

> In short, the evidence establishes that the Legislature could not have found a rational relationship between cap legislation and the purported "crisis."

Reply Brief for Plaintiff/Appellant/Cross-Appellee at 8, *Smith v. Schulte*, ___ So. 2d ___ (Ala. 1995) (Nos. 1930362 and 1930459).

In their brief below, Petitioners argued:

> There was and has been considerable debate concerning whether or not a crisis existed in the liability insurance industry. Opponents of tort reform argued repeatedly that no such crisis existed . . . , and many of Plaintiff's articles are directed to the issue. Such rhetoric, however, did not withstand a more reasoned analysis . . . , and it is clear that the House Judiciary Subcommittee heard testimony that one key underlying reason for the crisis was expanding and increasing tort liability.
>
> The statistical information on medical claims also confirmed a need for action. . . .
>
> There was also ample evidence available that the threat of malpractice litigation increased costs and decreased the availability of health care. . . .

Brief for Appellees/Cross-Appellants at 24-26, *Smith v. Schulte*, ___ So. 2d ___ (Ala. 1995) (Nos. 1930362 and 1930459) (citations omitted). Justice Shores, however, had reached her conclusions well before this case was argued.

In 1992, Justice Shores published an article in which she examined the impetus for tort reform, attacked the empirical data supporting legislative action, and concluded that reform legislation is unjustified. *See* Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 ALA. L. REV. 61 (1992).

The following excerpts are illustrative of Justice Shores' negative regard for the adherents of tort reform (which included healthcare providers, their insurers, and other representatives), as well as the process and bases of such reform:

> In the 1980s the debate [regarding punitive damages] continued, but it changed from a legal and academic one to "a highly politicized public policy debate about the alleged negative effects of punitive damages on American society and the economy." Well-financed groups whose interests would be served by the reduction or elimination of punitive awards have adopted a political agenda by which they seek to convince policymakers that a crisis exists that requires immediate action to reform the civil justice system. These groups contend that juries are awarding punitive damages in excessive amounts in increasing numbers of cases. The political agenda of these groups has invaded much of the academic debate concerning punitive damages. What was once a rational discourse has become "a matter of public relations,

> propaganda, and the mobilization of prejudice and fear."

Id. at 70-71 (footnotes omitted).

> The appeal to fear, emotion, and anxiety, while avoiding reason and rational discourse is known in the world of marketing as "slice of death" marketing. According to some observers, the groups seeking fundamental changes in the civil justice system are those that will benefit most from the changes, those potentially liable for punitive damages in the future. Naturally, they favor the reduction or elimination of punitive damages. To achieve these changes, they seek to create a belief in a "set of problems demanding those solutions." To that end, they argue the existence of a crisis which does not exist and contend that it is caused by the frequency and size of punitive damage awards.

Id. at 72 (footnotes omitted).

> Thus, it seems that the assault on the civil justice system in general and on punitive damage awards in particular continued unabated with the support of the Bush administration. Yet, now as then, no convincing evidence has been supplied for the proposition that the civil justice system constitutes a competitive disadvantage for American business.

Id. at 73.

> These assumptions are based upon little empirical evidence and the questionable interpretation of what scarce data exists, yet they have fueled the tort reform movement which

> has brought both legislative and judicial challenges to the doctrine of punitive damages.

Id. at 74 (footnote omitted).

> Although there is no reliable data showing that a crisis exists and no reliable data showing that radical changes in the civil justice system are called for, and despite the fact that all the reliable data indicates just the contrary, the proponents of change in the system have been successful in creating a political impetus for tort reform which has brought about the passage of state legislation purporting to solve a problem that does not exist. The tort reform legislation, if it survives constitutional challenge, could defeat the purpose of punitive damage awards.

Id. at 84.

These conclusions go directly to the heart of the constitutionality issue presented to the supreme court in this case. As part of its equal protection analysis, the supreme court purported to balance the statute's classification (and its attendant burden upon individual rights) against the problem that the statute sought to redress. *See Moore*, 592 So. 2d at 166. Under Alabama law, the legislature may not exercise its police power to create classifications "to prevent evils of a remote or highly problematical character. Nor may its exercise be justified when the restraint imposed upon the exercise of a private right is disproportionate to the amount of evil that will be corrected." *City of Russellville v. Vulcan Materials Co.*, 382 So. 2d 525, 527 (Ala. 1980). Clearly, any equal protection inquiry principally is concerned with assessing the existence and prevalence of the societal evil that the statute in question targets for correction. In this case, the evil the

Alabama Legislature identified was a crisis in the delivery of medical services to Alabama citizens.

Well over a year before this case presented the issue of the constitutionality of § 6-5-547, Justice Shores not only attacked the scientific value of the evidence available to the Alabama Legislature in framing the reform policies underlying § 6-5-547, she declared her rejection of that evidence, baldly announced that any legislative reform directed to punitive damages was unfounded, and expressly prejudged a central issue to be decided by the supreme court in this case. In so doing, Justice Shores unmistakably aligned herself with the opponents of tort reform and against healthcare providers such as Petitioners.[10] She destroyed any appearance of impartiality.

The right to an impartial judge is a basic requirement of due process. *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942, 946 (1955). Indeed, the right is so basic that the mere appearance of partiality can compel recusal, whether or not actual bias exists. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825, 106 S. Ct. 1580, 1587, 89 L. Ed. 2d 823, 835 (1986); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 98 (3rd Cir. 1992). The importance of the appearance of impartiality is clearly demonstrated in *Haines*, where the defendant tobacco companies sought

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[10] While criticizing the involvement of business and medical organizations in the debate, Justice Shores accepted the conclusions of The Roscoe Pound Foundation, an organization affiliated with the Association of Trial Lawyers of America. *Id.* at 82, n.130. Similarly, while critical of authorities cited in Petitioners' briefs, Justice Shores had cited with approval "authorities" later relied on by Plaintiff.

recusal of a judge who, in an earlier opinion, had remarked that the tobacco industry "may be the king of concealment and disinformation." The Third Circuit Court of Appeals, concluding that the judge's statements had destroyed the appearance of impartiality essential to due process, ordered his recusal. *Id.*

Haines is apposite to the facts of this case. Like the judge forced to recuse himself there, Justice Shores openly questioned the integrity and motivations of proponents of tort reform – an identifiable group that includes Petitioners – and thereby betrayed her deep-seated opinions undermining the impartiality essential to a fair hearing. Like the judge in *Haines*, Justice Shores may not have had any direct, personal, pecuniary interest in the outcome of the case, but due process nonetheless demands her recusal. *See id.*

As one of only two justices concurring in all respects in the supreme court's opinion, Justice Shores clearly exercised strong influence over the opinion's direction and content.[11] Her involvement in the opinion and judgment infected the decision against Petitioners with the taint of bias and prejudice in violation of due process.

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[11] Authorship of the opinion – one of constitutional magnitude – was attributed to "Per Curiam," making it impossible to discern precisely the full extent of Justice Shores' role in the drafting. Given her failure to recuse herself, and the opinion's failure to denote its author, it should be presumed that Justice Shores was at the very least actively involved in the opinion's formation if not its actual author.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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SUPREME COURT OF ALABAMA

SPECIAL TERM, 1995

1930362 and 1930459

Woodrow Smith, as administrator of the estate of Annie Jo Smith, deceased

v.

William J. Schulte, M.D., et al.

William J. Schulte, M.D., and Pulmonary Associates of Mobile, P.A.

v.

Woodrow Smith, as administrator of the estate of Annie Jo Smith, deceased

Appeals from Mobile Circuit Court (CV-90-001334)

PER CURIAM.

Woodrow Smith, as administrator of his deceased wife's estate, appeals from a judgment reducing to $1,276,873 a jury's $4,500,000 punitive damages award in his wrongful death action against William J. Schulte,

M.D., and Pulmonary Associates of Mobile, P.A. ("PAM"). Schulte and PAM cross appeal from that judgment.

On September 28, 1989, Annie Jo Smith was involved in an automobile accident in which she suffered contusions to the upper body and multiple fractures, including fractures of the ribs and hip. She was admitted to Knollwood Park Hospital in Mobile, where she was surgically treated for the fractured hip and was placed in the intensive care unit. Because she was breathing with difficulty, she was given supplemental oxygen externally, specifically, by an oxygen "mask," at a volume of 40%.

Throughout the night and the next day, her breathing difficulties increased progressively, and "pulmonologists" with PAM were summoned to consult and participate in her treatment. By 7:30 a.m., September 30, when she was first attended by Dr. Schulte, Mrs. Smith's breathing difficulties had not lessened, despite the fact that her supplemental oxygen supply had been increased to a concentration of 100%. Moreover, test results suggested that she had begun suffering from "adult respiratory distress syndrome" ("ARDS"), pneumonia, and one or more additional infections.

Dr. Schulte concluded that her respiratory condition required *mechanical* oxygenation – an *internally* inserted "endotracheal tube" connected to a mechanical "ventilator." Between 9:05 a.m. and 9:15 a.m., he inserted an endotracheal tube through a passageway in her throat. As she was being "intubated" in this manner, Mrs. Smith became "combative." Doctor Schulte then ordered the administration of Pavulon, a drug that, within 30 seconds of administration, paralyzes striated muscles and renders

all voluntary muscular activity – including breathing – impossible.

Coincident with the cessation of her voluntary movement, Mrs. Smith's blood pressure began falling; it continued to fall until 9:15 a.m., by which time she had lost all blood pressure and experienced a "cardiac arrest." After Dr. Schulte and accompanying medical personnel had initiated cardiopulmonary rescusitation and other measures calculated to revive her, Dr. Schulte noticed "gastric contents in the tube"; that fact revealed that the endotracheal tube had, in fact, passed through Mrs. Smith's *esophagus* into her *stomach* instead of into her *lungs*. Subsequently, a new endotracheal tube was properly inserted; however, Mrs. Smith, who had by that time lost consciousness, never revived.

She died four days later, October 4, 1989. An autopsy revealed that the "immediate cause of death" was "anoxic encephalopathy, cerebral edema with brain stem herniation." More colloquially stated, Mrs. Smith had suffered a period of oxygen deprivation that caused her brain to swell out of its cavity and force its way "down into the spinal canal."

On April 19, 1990, Woodrow Smith, as administrator of his wife's estate, sued Dr. Schulte and PAM. The complaint alleged that Dr. Schulte had "passed the [endotracheal] tube into the esophagus, [and had left the] tube for a period of time so that it produced brain death and cardiac arrest," followed by "the wrongful, premature" death of Mrs. Smith. The cause was tried to a jury, which, on April 6, 1993, returned a verdict for Mr. Smith in the amount of $4,500,000.

On April 23, 1993, Dr. Schulte and PAM filed a motion requesting reduction of the verdict to $1,000,000, with consumer-price-index adjustments, the amount of the damages limitation set forth in Ala. Code 1975, § 6-5-547. On November 5, 1993, the trial court conducted a post-verdict review of the damages award, as required by *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), and *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989). At this hearing, Smith renewed an argument he had made before trial, namely, that § 6-5-547 violates rights guaranteed him by the Constitution of Alabama.

Following this hearing, the trial court concluded that the verdict was supported by the evidence and was not excessive. It also rejected Smith's constitutional challenges, however, and applied the damages limitation set forth in the statute. Consequently, it entered a judgment for Smith in the amount of $1,276,873. From that judgment, all the parties appealed. In case number 1930362, Smith challenges the constitutionality of § 6-5-547, and, consequently, the reduction of the verdict. In case number 1930459, Dr. Schulte and PAM challenge the judgment, contending that the verdict on which it was based was excessive.

I. Case Number 1930362

Smith challenges on two grounds the constitutionality of § 6-5-547, which provides in pertinent part:

> "In any action commenced pursuant to Section 6-5-391 or Section 6-5-410, against a health care provider whether in contract or in tort based on a breach of the standard of care the

> amount of *any judgment entered in favor of the plaintiff shall not exceed the sum of $1,000,000. Any verdict returned in any such action which exceeds $1,000,000 shall be reduced to $1,000,000 by the trial court* or such lesser sum as the trial court deems appropriate in accordance with prevailing standards for reducing excessive verdicts. . . . The maximum amount payable under this section, $1,000,000. shall be adjusted on April fifteenth of each year to reflect any increase or decrease during the preceding calendar year in the consumer price index of the United States Department of Commerce. Said adjustment shall equal the percentage change in the consumer price index during the preceding calendar year."

(Emphasis added.) He contends (1) that § 6-5-547 violates the constitutional provisions guaranteeing the equal protection of the laws, and (2) that it violates the constitutional provision guaranteeing the right to a trial by jury. We shall address those contentions in that order. Moreover, because Smith does not challenge § 6-5-547 under any provision of the United States Constitution, our analyses and conclusions are based entirely on adequate and independent state law grounds.

A. Equal Protection

Smith bases his equal protection argument on *Moore v. Mobile Infirmary Association*, 592 So. 2d 156 (Ala. 1991), in which four Justices of this Court concluded that Ala. Code 1975, § 6-5-544(b),[1] violated the equal protection

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[1] Section 6-5-544(b) limited to $400,000 any recovery of non-economic damages in medical malpractice actions.

guarantee arising under the Alabama Constitution. More specifically, the plurality concluded that the statute represented unreasonable " 'class legislation arbitrarily discriminatory against some and favoring others in like circumstances.' " 592 So. 2d at 165 (quoting *Opinion of the Justices*, 252 Ala. 527, 530, 41 So. 2d 775, 777 (1949)) (plurality opinion). One Justice declined to "express [an] opinion" on the equal protection question, because he had already joined with four other Justices in the preceding section of Moore, holding that § 6-5-544(b) violated the right to a *trial by jury*. 592 So. 2d at 178 (Almon, J., concurring specially). We now hold that § 6-5-547 represents a similar form of "class legislation" that is unreasonable, and, therefore, violates the equal protection guarantee of the Constitution of Alabama.

In reaching its conclusion, the plurality reiterated a previously established principle, namely, that the analysis of a claim alleging a violation of the equal protection afforded by our state constitution does not parallel, or necessarily produce the same result as, an analysis based on the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Moore*, 592 So. 2d at 170. The Alabama constitution allows the legislature to classify citizens in order to effect some "public interest," the plurality explained, only insofar as the resultant burden on individual rights or liberties does not outweigh the benefits effected by the statute. *Id.* at 166. In other words, "whether the classifications created under [the challenged statute] represent a reasonable exercise of legislative power depends on whether they are reasonably related to the stated objective, and on whether the benefit

sought to be bestowed upon society *outweighs* the detriment to private rights occasioned by the statute." *Id.* (emphasis added).[2] One factor to be weighed in this determination is the relative importance of the private right or interest burdened by the statute.

While conceding that the *Moore* plurality applied a more rigorous standard of review than the Fourteenth Amendment would, arguably, have required, Dr. Schulte and PAM dispute the correctness of the *Moore* plurality's conclusion. Moreover, they attempt to distinguish § 6-5-547 from the statute reviewed in *Moore*, on the basis of the *species* of damages affected; whereas *Moore* involved a limitation on compensatory damages, § 6-5-547 – involved here – limits recovery of punitive damages. This distinction is important, because, they contend, the "[a]pplication of a damages cap in a wrongful death action . . . does not affect *property* rights." *Brief of Appellees/Cross Appellants*, at 19 (emphasis added). They insist that "[p]laintiffs have no *property* rights in punitive damages [in] a wrongful death action." *Id.* (emphasis added). They urge this Court to apply the "minimum scrutiny" standard, *id.* at 20 – a standard developed by the federal judiciary under the Fourteenth Amendment for reviewing legislation affecting "neither a 'suspect class' nor a 'fundamental right,' " *Gideon v. Alabama State*

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[2] Occasionally, *federal* courts apply a similar test, that is, one of "balancing the government's interests against the interests of the individuals affected." *Gideon v. Alabama State Ethics Comm'n*, 379 So. 2d 570, 574 (Ala. 1980) (citing *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), *Whalen v. Roe*, 429 U.S. 589 (1977), and *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979)).

Ethics Comm'n, 379 So. 2d 570, 574 (Ala. 1980) – which standard it typically applies to "economic legislation." *Brief of Appellees/Cross Appellants*, at 20.[3] The defendants insist that this standard is applicable here, because, they argue, Smith's cause of action involves no fundamental rights. We disagree with this argument.

In Alabama, citizens enjoy a fundamental right not to be deprived of *liberty* and life as a consequence of fatal malpractice. Cf. *Breed v. Atlanta, B. & C. R. R.*, 241 Ala. 640, 642, 4 So. 2d 315, 316 (1941) (purpose of wrongful death actions is to "stimulate diligence in the protection of [a person's] natural right to live, without respect to the personal condition or disability of the person so protected"). Personal representatives of victims of fatal malfeasance, acting as agents of the citizen body, seek to vindicate the abridgment of that interest. *Id.; Richmond & D. R. R. v. Freeman*, 97 Ala. 289, 293, 11 So. 800 (1892) (recovery for wrongful death serves as "retribution for the wrong" committed).

This "liberty" interest derives in a measure from the fact that "Alabama is the only state in which" recovery for wrongful death has been judicially restricted to punitive damages. *Black Belt Wood Co. v. Sessions*, 514 So. 2d 1249, 1262 (Ala. 1986). The "punitive only" rule is an outgrowth of the strong public policy served by the right of this action in Alabama, which policy is "the *preservation of human life*." *Id.* at 1258 (emphasis added). The rule

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[3] That standard of review validates any statute that is "rationally related" to a "proper governmental purpose." *Gideon v. Alabama State Ethics Comm'n*, 379 So. 2d 570, 574 (Ala. 1980).

meticulously "distinguish[es] between the value of human life in general" and "the value of a *particular* life." *Atkins v. Lee*, 603 So. 2d 937, 942 (Ala. 1992) (emphasis in original). In resting, as they do, on the inestimable "value of human life in general," *id.*, the fundamental tenets underlying Alabama's right of action for wrongful death are entirely inconsistent with the imposition of "an arbitrary cap" on that value. *Killough v. Jahandarfard*, 578 So. 2d 1041, 1044 (Ala. 1990).

As a matter of logic, the personal representative of a victim of *fatal* medical malpractice has a greater interest in the aggressive prosecution of a wrongful death claim for the species of damages recoverable than does the victim who *survives* to seek the species of damages involved in *Moore*. The importance of this liberty interest is a factor that figures prominently in our consideration of the equal protection challenge to § 6-5-547.

Section 6-5-547 offends Alabama's equal protection guarantee, Smith contends, by creating multiple classes of citizens, based on the involvement of a medical provider. First, he insists that the statute creates "special classes" of wrongful death parties, composed of defendant medical malefactors and the personal representatives of their victims. *Brief of Plaintiff/Appellant/Cross-Appellee*, at 31. In other words, he argues, the parties in this class of wrongful death action are subject to the statutory damages limitation, while the parties in all other classes of wrongful death actions are subject to no such limitation. Second, Smith contends that § 6-5-547 further *sub*classifies these parties, according to the reprehensibility of the defendant's conduct, that is, by separating those tort-

feasors whose conduct warrants damages in excess of the cap from those whose conduct does not.

We agree that § 6-5-547 displays these features, and we conclude that § 6-5-547 functions – mechanically, at least – in every material respect as did the damages cap legislation addressed in *Henderson v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993) (invalidating on the right-to-trial-by-jury grounds Ala. Code 1975, § 6-11-21); and in *Moore v. Mobile Infirmary Association, supra*. Also, § 6-5-547 and § 6-5-544(b), the section involved in *Moore*, originally were adopted as §§ 8 and 5, respectively, of the Medical Liability Act of 1987. Act No. 87-189, 1987 Ala. Acts; they were, therefore, both enacted for the purpose expressed in § 6-5-540.[4] For these reasons, the issue in this case is, as

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[4] Section 6-5-540 provides in pertinent part:

> "It is hereby declared by the Legislature of the State of Alabama that a crisis threatens the delivery of medical services to the people of Alabama and the health and safety of the citizens of this state are in jeopardy. In accordance with the previous declaration of the legislature contained in Act 513 of the regular session of the 1975 Alabama Legislature it is the declared intent of this legislature to insure that quality medical services continue to be available at reasonable costs to the citizens of the State of Alabama. This legislature finds and declares that the increasing threat of legal actions for alleged medical injury causes and contributes to an increase in health care costs and places a heavy burden upon those who can least afford such increases, and that the threat of such actions contributes to expensive medical procedures to be performed by physicians and other health care providers which otherwise would not be considered necessary, and that the spiraling costs and

the plurality stated in *Moore*, "whether the connection between the benefit sought to be conferred on society and the means employed to accomplish it, when weighed against the inequalities created by the statute's classifications, is so attenuated and remote as to constitute an unreasonable exercise of police power." 592 So. 2d at 167. Because the issue in this case parallels the one in *Moore* and requires a parallel analysis, we quote the *Moore* plurality's discussion at length:

> "A seminal study conducted by the United States General Accounting Office ('GAO') suggests that the connection between damages caps and the total cost of health care is . . . remote.
>
> "In response to a request from members of Congress, the GAO conducted a study on, *inter alia*, the effect on malpractice insurance of various statutory reforms enacted in response to the escalation of insurance costs of the 1970's. The GAO issued its findings in 1986 and 1987 through a series of published reports.
>
> "The GAO study found 'no consensus among the interest groups [surveyed] that any of the reforms implemented in response to the situation experienced in the mid-1970's . . . had a major effect' on the cost of malpractice insurance. General Accounting Office, *Medical Malpractice: No Agreement on the Problems or*

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decreasing availability of essential medical services caused by the threat of such litigation constitutes a danger to the health and safety of the citizens of this state, and that this article should be given effect immediately to help control the spiraling cost of health care and to insure its continued availability."

Solutions. HRD-86-50 (February 1986), at 3 ('HRD-86-50'). Despite the fact that statutory reform, including damages caps, had been in place for nearly 10 years in some states, the GAO found that in the period 'from 1983 to 1985, total medical malpractice insurance costs for physicians and hospitals rose from $2.5 billion to $4.7 billion.' General Accounting Office, *Medical Malpractice: Insurance Cost Increased but Varied Among Physicians and Hospitals*, HRD-86-112, at 2 (September 1986) ('HRD-86-112'). (Emphasis added.) It noted that the increase in the cost of malpractice insurance to health care providers greatly exceeded the 'change in either the consumer price index or the medical care index.' *Id.* at 2-3. The GAO could identify 'no clear answer as to the causes of the increases in the cost of medical malpractice insurance.' General Accounting Office, *Medical Malpractice: A Framework for Action*, HRD-87-73, at 2 (May 1987) ('HRD-87-73'). Nor could it identify any 'specific action . . . that would guarantee that insurance rates [would] not continue to increase.' *Id.*

"At this point, it must be noted that the GAO study did not attempt specifically to assess the impact of damages caps on the cost or availability of malpractice insurance. Its primary value to our appraisal of the reasonableness of § 6-5-544(b) lies in the insight the study provides into the relative importance to the total cost of health care of the various components of the total implicated by the statute.

"In that connection, the GAO noted that the cost of malpractice insurance was the product of a number of elements and that the size and

frequency of claims resulting from damages awards or settlements were only two of those elements. HRD-87-73, at 8. Other elements influencing the cost of malpractice insurance included 'administrative expenses, marketing costs, investment income, taxes, profits, extent of state regulation, and amount of competition in the market.' *Id.* at 31. The study also cited the 'availability of reinsurance, [and the] extent of competition in the market' as contributing factors. General Accounting Office, *Medical Malpractice: Six-State Case Study Shows Claims and Insurance Costs Still Rise Despite Reforms*, HRD-87-21, at 9 (December 1986) ('HRD-87-21').

"Not only does it appear that the element of damages awards composes but a fraction of the cost of malpractice insurance, but the study also revealed that malpractice insurance costs made up only 9 percent of the 'total professional expenses' for self-employed physicians. HRD-86-112, at 3. 'Nonphysician payroll,' composing 33 percent of total expenses, ranked at the top of the list. 'Office expense' and 'medical supplies' ranked behind payroll at 26 and 11 percent of total expenses respectively. Only 'medical equipment' ranked below malpractice insurance costs, at 6 percent of total professional expenses. *Id.* at 4. Indeed, the study revealed that despite the increase in cost of malpractice insurance between 1983 and 1985, 'total physician premiums,' as of September 1986, 'still [composed] less than 1 percent of the country's total health care costs' based on the 1984 figure of approximately $390 billion. *Id.* at 25.

"Other studies addressing the effects of the 'tort reform' of the mid-1970's have largely

corroborated the GAO's conclusions. One study concluded that damages caps could reduce the number and size of *claims* paid out as a result of settlements or damages awards. P. Danzon, *The Effects of Tort Reforms on the Frequency and Severity of Medical Malpractice Claims*, 48 Ohio State L.J. 413, 416 (1987). The author noted, however, that her studies did not address the 'effect of tort reforms on malpractice insurance *rates*.' *Id.* at 417. (Emphasis added [in *Moore*].)

"Another study attempted to establish a correlation between various approaches to tort reform and the price of malpractice insurance; nevertheless, the author noted: 'To date, no one has isolated the effects of specific legislative actions on either the price or availability of malpractice insurance.' F. Sloan, *State Responses to the Medical Malpractice Insurance 'Crisis' of the 1970's: An Empirical Assessment*, 9 J. Health Politics, Policy, and Law 629, 630 (1985). The author concluded:

> " 'Whereas many of the potential sources of premium inflation are national in scope, deliberate action has been undertaken mostly at the state level. *The empirical results of the study presented here give no indication that individual state legislative actions, or actions taken collectively have had their intended effects on premiums.* [Emphasis added in *Moore*.] The publicity resulting from considerable legislative activity may have made juries and perhaps potential plaintiffs more aware of the cost consequences of malpractice suits. If so, this effect probably extended beyond the boundaries of any particular state.

> " 'Another possibility is that *past frequency of claims and size distribution of settlements in a state are only weakly related to premiums in the state.* [Emphasis added in *Moore*.] Premiums are set on the basis of expected outlays, and insurers may not have based their expectations for the future on past experience. Unfortunately, state-specific data on claims frequency and dollar amounts of settlements are not available for 1974 and thereafter. However, correlations among 1974 premiums, claims filed, cases won by plaintiffs, and mean size of awards for 1970 are surprisingly low (0.3 or less). Certainly, adverse insurer experience in a given year should be reflected in higher premiums in later years, so that higher correlations were anticipated. There is a need for more "hard" empirical evidence on how insurers *really* [emphasis in original] form expectations and set premiums.'

"*Id.* at 643 (footnotes omitted). See generally P. Zwier and D. Piermattei, *Who Knows Best About Damages: A Case for Courts' Rights*, 93 Dick. L. Rev. 689 (1989).

"In considering the evidence presented in these studies, we do not review the wisdom of the legislation challenged in this case. See *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996, 1000 (Ala. 1982). We consider it only in our assessment of the juxtaposition of the $400,000 cap to the goal of reducing the cost of health care based on information that was available to the legislature in 1987. To permit the legislature to act as the sole arbiter of such juxtaposition, would be to vacate our judicial role. *Brannigan v.*

Usitala, 134 N.H. 50, 587 A.2d 1232 (1991); *Lucas v. United States*, 757 S.W.2d 687, 691 (Tex. 1988).

> "We conclude that the correlation between the damages cap imposed by § 6-5-544(b) and the reduction of health care costs to the citizens of Alabama is, at best, indirect and remote. Although there is evidence of a connection between damages caps and the size of malpractice claims filed, the size of claims is merely one among a host of factors bearing on the cost of malpractice insurance. HRD-87-73, *supra*, at 8, 31. Even more significantly, the cost of malpractice insurance ranks near the bottom of the list of expenses incurred by health care providers. HRD-86-112, *supra*, at 3-4. Consequently, the size of claims against health care providers represents but one among many elements composing the cost of malpractice premiums, which, in turn, represent only a small component of the total burden borne by health care consumers. *Id.* at 25."

592 So. 2d at 167-69 (footnote omitted).

On the basis of this extensive statistical analysis, the plurality concluded that the connection between the benefit sought from § 6-5-544(b) and the means used to obtain it was too "indirect and speculative" to support the classifications created. *Id.* at 170. In so concluding, it emphasized the fact that the individuals most benefited by the statute were the medical malefactors "who [were] *most irresponsible.*" *Id.* (emphasis in original).

The plurality's statistical analysis of § 6-5-544(b), which section formed part and parcel of the same "tort reform package" as § 6-5-547, is equally applicable to this

case, as are its conclusions regarding the inherent inequities of the damages cap.

Indeed, the classifications created by § 6-5-547 are singularly bizarre and anomalous in view of the particular right of action to which the statute applies.

Section 6-5-547, in limiting recovery in certain wrongful death actions to $1,000,000, places *a specific value on human life*. Such a result represents a fundamental departure from the law and policy of this state as it has existed since 1877. See *Atkins v. Lee*, 603 So. 2d 937 (Ala. 1992); *Central Alabama Electric Co-op v. Tapley*, 546 So. 2d 371 (Ala. 1989); *Estes Health Care Centers, Inc. v. Bannerman*, 411 So. 2d 109 (Ala. 1982); see also *South & North Alabama R. R. v. Sullivan*, 59 Ala. 272 (1877); *Savannah & M.R. Co. v. Shearer*, 58 Ala. 672 (1877). Far more troubling, however, is the fact that it assigns this value to one isolated class of Alabama citizens, namely, the victims of fatal *medical malpractice*.

The notion that the lives of some of Alabama's citizens are worth *less* than the lives of others is an idea that carries the *gravest of implications*. We can conceive of nothing but the most compelling of circumstances that could justify the consequences of such a classification, with its attendant burden on the fundamental liberty interest of our people. Nothing but the strongest possible connection between the benefit sought and the means used to obtain it could justify such an odious burden on the fundamental liberty interest discussed above – which interest accrues to all Alabama citizens *equally*. This case involves neither the circumstances nor the necessary connection. Therefore, we hold that § 6-5-547 violates the

equal protection guarantee of the Constitution of Alabama.

B. Jury Trial

Smith also contends that § 6-5-547 violates Ala. Const. 1901, § 11, which provides: "That the right to trial by jury shall remain inviolate." In support of this contention, he relies, again, on *Moore*, in which this Court held that § 6-5-544(b) violated § 11, and, additionally, on *Henderson v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993), in which we held that § 6-11-21, which "limit[ed] to $250,000 jury awards of punitive damages," *id.* at 880, violated the right to a jury trial as guaranteed by § 11. *Id.* at 894. Dr. Schulte and PAM point out a distinction between the statute invalidated in *Henderson* and the statute under review in this case, namely, that the cause of action affected by § 6-11-21 was of common law origin, while the cause of action affected by § 6-5-547 is of *statutory* origin.

It is well settled in Alabama that § 11 governs (1) those causes of action arising under the common law, *and* (2) those causes of action afforded by *pre-1901 statutes*. This principle was never more forcefully stated than in *Gilbreath v. Wallace*, 292 Ala. 267, 270, 292 So. 2d 651, 653 (1974), where the Court declared: "Alabama's Constitution effected a 'freezing' of the right to jury trial as of 1901." 292 Ala. at 269, 292 So. 2d at 652. See also *Alford v. State ex rel. Attorney General*, 170 Ala. 178, 188-89, 54 So. 213, 215-16 (1910) (Mayfield, J., dissenting); *Tims v. State*, 26 Ala. 165 (1855).

The fact that *Gilbreath* involved the power of the legislature to change the numerical composition of juries in will contests, rather than an issue more closely analogous to a damages cap, is not significant. Significant is the fact that it reaffirmed an important principle of general application, and that this Court has never abandoned that principle.

In particular, *Ex parte Giles*, 632 So. 2d 577 (Ala. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 2694 (1994), did not – the defendants' arguments notwithstanding – retreat from this principle. To be sure, *Giles* held that § 11 did not prevent the trial judge in a capital murder trial, based on former Ala. Code 1975, §§ 13-11-1 to -8, from overriding a jury's sentencing recommendation, even though the murder statutes existing in 1901 did not provide for such an override. 632 So. 2d at 583. In so holding, however, this Court was careful not to overrule, expressly or implicitly, the relevant aspect of *Gilbreath*. On the contrary, in an extended discussion, we set forth a number of reasons why the *particular* sentencing procedure was not governed by the *Gilbreath* rule. *Ex parte Giles*, 632 So. 2d at 580-83.[5] Had we intended to abrogate that rule, the short

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[5] The Court contrasted the close scrutiny exercised by the federal judiciary in regard to state "capital sentencing procedure" with the great deference afforded states in the area of "punitive damages assessments." *Ex parte Giles*, 632 So. 2d at 582 (citing *TXO Production Corp. v. Alliance Resources Corp.*, ___ U.S. ___, 113 S.Ct. 2711 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991)). This distinction was the most conspicuous basis for the Court's holding – a distinction based on the Supremecy Clause of the Federal Constitution and the consequent subordination of § 11 doctrine in capital cases. That basis is obviously inapplicable here.

answer to Giles's challenge would have been to reject it forthrightly, briefly stating: "We hereby overrule *Gilbreath* to the extent it holds that § 11 freezes the right to a trial by jury as it existed *by statute* in 1901." Apparent, therefore, from a thorough reading of *Ex parte Giles* is the fact that this Court did not, as the defendants contend and as Justice Houston's dissent suggests, overrule that basic *Gilbreath* principle.

Also significant is the fact that the principle applies to the right of trial by jury insofar as it includes the right to have the jury determine the amount of damages. *Henderson, supra; Moore, supra.* Indeed, damages assessment epitomizes the jury's function as a factfinder. See *Moore*, 592 So. 2d at 164 ("practical effect of the damages limitation . . . is to prevent the jury from applying the *facts*") (emphasis in original); *Clark v. Container Corp. of America, Inc.*, 589 So. 2d 184, 195 (Ala. 1991) (provision prohibiting the jury from " 'reduc[ing] any future damages to present value' " usurps its "factfinding function") (principal opinion by Houston, J., with one Justice concurring and five Justices concurring in the result).

Because Ala. Code 1896, §§ 26 and 27 – which differed in no relevant respect from their successors, §§ 6-5-391 and -410, Ala. Code 1975, the current version of the Wrongful Death Act – afforded personal representatives the right to "such damages as the jury may assess," that right was "frozen" by the ratification of the Constitution of 1901. In other words, the ratification of this present constitution removed from the legislature the power to abrogate the jury's fundamental factfinding role in wrongful death cases. But that is precisely what the legislation under review purports to do.

Thus, in imposing, regardless of the facts in each case, an absolute limitation on the amount of damages the jury may assess, § 6-5-547 operates precisely like the sections invalidated in *Moore* and *Henderson*, specifically, it inhibits the jury in the most fundamental aspect of its function. The conclusion is inevitable, therefore, that § 6-5-547 violates the right to trial by jury as guaranteed by § 11 of the Constitution of Alabama.

This conclusion is not inconsistent with *Garner v. Covington County*, 624 So. 2d 1346 (Ala. 1993), another case on which the defendants rely. In that case, the Court held that Ala. Code 1975, § 11-93-2, which limited to $100,000 jury awards of damages against "governmental entitit[ies] [sic]," did not violate § 11. 624 So. 2d at 1354. The holding in *Garner* rested on the "unique status of counties and cities as governmental entities." *Id.* at 1351. "Because they are creations of the sovereign, the State of Alabama, and because they exercise certain governmental functions that are dependent upon tax dollars," the Court explained, "actions against them have always been subject to reasonable regulation by the legislature on a basis not applicable to actions against individuals and other entities." *Id.*

The distinction between the entities subject to § 11-93-2 and those subject to § 6-5-547 renders these respective statutes so fundamentally distinguishable as to eliminate the need for further elaboration. Suffice it to say, as did the trial judge: "The defendants in the case at bar do not enjoy the unique status of counties or cities; and, therefore, no such status, crucial to the rationale of *Garner*, supports the constitutionality of the § 6-5-547 cap

on any wrongful death judgment against medical providers." C. R. 1055.

Our conclusions in Case Number 1930362 are, therefore, that § 6-5-547 violates the constitutional provisions guaranteeing (1) the equal protection of the laws and (2) the right to trial by jury. Consequently, the judgment of the trial court, to the extent it applied the damages limitation contained in the statute, is reversed.

II. Case Number 1930459

In their cross appeal, Dr. Schulte and PAM do not challenge the judgment on the grounds of sufficiency or weight of the evidence supporting the verdict. They contend only that the amount of the verdict was *excessive*. In its order following the *Hammond/Green Oil* hearing, the trial court, before addressing the constitutionality of the damages cap, considered whether a remittitur was warranted, and it concluded that the verdict of $4,500,000 was not excessive.

In *Duck Head Apparel Co. v. Hoots*, [Ms. 1931146, February 17, 1995] ___ So. 2d ___ (Ala. 1995), this Court, quoting the trial court's *Hammond/Green Oil* order in that case, set forth the following list of factors relevant to the question whether a punitive damages verdict is excessive, generally:

" '(1) Culpability of defendant's conduct.

" '(2) Desirability of discouraging others.

" '(3) Impact on the parties.

" '(4) Impact on innocent third parties.

" '(5) Relationship between actual [or] potential harm and the amount of the verdict.

" '(6) Degree of reprehensibility of defendant's misconduct, including duration, defendant's awareness, harm caused or likely to be caused by defendant's conduct and any concealment or cover-up.

" '(7) Whether defendant profited from its activities.

" '(8) Financial position of defendant.

" '(9) Costs of litigation.

" '(10) Criminal sanctions.

" '(11) Other civil actions.

" '(12) Availability of liability insurance.

" '(13) Comparative analysis of similar cases.

" '(14) Actual/compensatory damages awarded.

" '(15) Efforts by defendant to remedy the wrong and the opportunity or lack of opportunity that plaintiff gave defendant to remedy the wrong."

___ So. 2d at ___. Although we have considered all of those factors that are relevant to this case, several of them warrant particular discussion.

A. Harm Threatened by the Defendants' Conduct

This factor weighs in favor of an award of substantial punitive damages. It was well established at trial – indeed, conceded – that the administration of Pavulon to a patient during intubation renders the patient incapable,

not only of respiration, but also of speech. A patient thus paralyzed is conscious of her surroundings, but must depend entirely – and silently – upon her attendants for her oxygen supply. Dr. Schulte conceded that in such a case the failure of attendants timely to ascertain the location in the body of the endotracheal tube would, if it had entered the stomach, result in a rapid deterioration of the patient's condition, progressing from cardiac arrest, through irreversible brain damage, to death. He also testified that placement confirmation is properly accomplished by listening to the incubated patient's lungs and stomach with a stethoscope, but conceded that he did not listen in this manner, or direct any of the five medical personnel assisting him to do so, before Mrs. Smith lost her blood pressure and suffered a cardiac arrest.

Failing timely to discover the improper placement of an endotracheal tube in a paralyzed patient imports to a physician the probability of the gravest of consequences. In such cases death, or at least severe brain damage, is virtually certain. Moreover, the trauma suffered by a patient who, conscious of her surroundings, knows that she is dying of suffocation, but, because of the paralyzing drug, is unable to communicate her distress, will be *extreme*. Substantial damages are necessary to punish and deter substandard behavior attended by such severe consequences of which a physician is necessarily aware.

These considerations *support* the amount of the verdict returned in this case. They must, however, be weighed against the following *countervailing* factors.

B. Attempts at Concealment or Cover-up

Within three hours of the procedure, Dr. Schulte told Mr. Smith that he had misplaced the endotracheal tube and that he had failed to discover the error for several minutes. The following day, he repeated this account to Mr. Smith and to Mr. Smith's daughter. Moreover, Dr. Schulte expressly noted the misplacement of the endotracheal tube on Mrs. Smith's medical chart.

Without doubt, these admissions facilitated Smith's discovery of a cause of action and the prosecution of his case against Dr. Schulte and PAM. In view of the respiratory complications Mrs. Smith was experiencing independent of the intubation episode, the autopsy report – referring only generally to oxygen deprivation – did not, of itself, afford a firm basis for a cause of action. Thus, had Dr. Schulte been less candid, the Smiths, and, ultimately, the jury, may never have learned of the *distinct period* of oxygen deprivation made the basis of this action.

Such candor should be encouraged by affording it considerable weight in the overall punitive damages analysis. We, therefore, consider Dr. Schulte's admissions to the Smiths and notations in the medical chart a significant countervailing factor.

C. Financial Impact of the Verdict

Regarding the defendants' financial positions, the trial court made the following findings:

> "Defendants each have $1,000,000 in liability insurance with Mutual Assurance for a total of $2 million in insurance. Dr. Schulte has

> $438,600 in personal assets (excluding the $245,000 in debt on his two houses) and earned $127,158 in adjusted gross income in 1988, $174,330 in adjusted gross income in 1989, $354,877 in adjusted gross income in 1990, $395,627 in adjusted gross income in 1991, and $377,173 in adjusted gross income in 1992.
>
> "Pulmonary Associates of Mobile had a net Stockholders' Equity of $147,003.06 at the end of its fiscal year on September 30, 1992, had physical assets which cost $597,059 and had a net book value of $159,650.02 on September 30, 1993, and had accounts receivable of 'approximately a couple of a million dollars,' which have an historic collectability factor of 68%. Since the time its last financial statements were created, Pulmonary Associates purchased a computer system which cost in excess of $80,000. . . . There are four equal shareholders in the group, Drs. Schulte, McAtee, Saucier and Gottlieb. For the fiscal year ending September 30, 1992, Pulmonary Associates' gross collections were $3,802,616."

(Citations omitted.)

Based on these figures, the trial court predicted that Dr. Schulte and PAM would be able to "*survive* the verdict . . . by applying existing assets and a part of future income." (Emphasis added.) The defendants dispute this prediction, contending that the imposition of the $4,500,000 verdict would "destroy" their practice. *Brief of Appellees/Cross Appellants*, at 43.

The defendants' contention merits careful consideration. The $2.5 million remaining of the verdict after deduction of $2 million, the aggregate amount of insurance carried by the defendants, would *entirely obliterate*

PAM's accounts receivables for nearly two full years [68% of $2 million (collection rate) equals $1,360,000 (accounts receivable for one year), minus $2.5 million equals -$1,140,000]. The sum of the remainder of the defendants' aggregate assets also compares unfavorably to the portion of the verdict exceeding the amount of insurance. Regardless of whether the defendants could, as the trial court predicted, "survive" the verdict, the execution of a judgment on the full amount of the award would impose a *crushing burden* on the defendants' practice.

To accomplish its purpose, the amount of a punitive damages award "should be enough to punish the defendant and vindicate the public's right to be free of the kind of conduct of which the jury has found the defendant guilty, *but [it] should not be so much as would financially destroy him." Fuller v. Preferred Risk Life Ins. Co.*, 577 So. 2d 878, 885 (Ala. 1991) (emphasis added). The verdict awarded in this case would come perilously close to financially destroying the defendants.

In summary, consideration of all the factors relevant in a *Hammond/Green Oil* analysis compels the conclusion that this punitive damages verdict was excessive and must be reduced by $2,000,000. Consequently, the ruling of the trial court at issue in Case Number 1930362 is reversed. As to Case Number 1930459, the judgment is affirmed, conditioned upon Smith's acceptance within 28 days of a remittitur of $2,000,000, resulting in a judgment for Smith in the amount of $2,500,000.[6]

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[6] Dr. Schulte and PAM also contend that the trial court committed errors of various species relating to the conduct of

1930362 – REVERSED.
1930459 – AFFIRMED CONDITIONALLY.

Shores and Ingram, JJ., concur.

Kennedy, J., concurs specially.

Almon, J., concurs in part and concurs in the result in part.

Cook, J., concurs except as to Part I.B.

Butts, J., concurs in the result.

Maddox and Houston, JJ., dissent.

Smith v. Schulte and *Schulte v. Smith*
KENNEDY, JUSTICE (concurring specially).

I concur specially in order to address Justice Houston's comments in his dissenting opinion.

I think it would come as quite a shock to Alabamians to learn that they have no right of equal protection under the Alabama Constitution. That proposition is the basic premise of the dissent. They should be shocked, because that proposition is simply not so. Indeed, in *Ex Parte Caffie*, 516 So.2d 831, 837 (Ala. 1987), Justice Houston, writing for the Court, recognized the existence of an equal protection guarantee under the Constitution of Alabama. In *Caffie*, Justice Houston cited *Ex parte Jackson*, 516

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the trial. We have considered these contentions and have found them to be without merit.

So.2d 768 (Ala. 1986), for the proposition that "*state equal protection provisions* afford protection against racially motivated peremptory strikes similar to that afforded by the federal constitution." 516 So.2d at 837. (Emphasis added.) Similarly, in *Ex parte Southern Ry.*, 556 So.2d 1082 (Ala. 1989), a majority of the Court, including Justice Houston, held, in pertinent part, that certain venue and jurisdiction laws affecting foreign corporations did not violate "the equal protection provisions of the constitution of the State of Alabama." 556 So.2d at 1091.

There is no ambiguity, for example, in these words from the very first section in our constitution: "That all men are equally free and independent."[7] See Art. I, § 1, Constitution of 1901. Absent ambiguity, the Court cannot look to dictionaries, previous constitutional provisions, or debates of a constitutional convention to obfuscate or alter the meaning of these words. As Justice Houston once quoted from *The Rubáiyát of Omar Khayyám* (4th ed. 1879):

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[7] This section reads, *in toto*: "That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness."

Repeatedly the Court has held that this provision, in conjunction with §§ 6 and 22 of Article I of the Constitution of 1901, confers a guarantee of equal protection. See, e.g., *Ex parte Jackson*, 516 So.2d 768 (Ala. 1986); *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156 (Ala. 1991).

My position has been, and remains, that the Constitution of 1901 guarantees equal protection of the laws. That equal protection is guaranteed by Art. I, § 1, of the Constitution, is buttressed by the language of §§ 6 and 22.

" 'The Moving Finger writes; and, having writ,

Moves on: nor all your Piety nor Wit

Shall lure it back to cancel half a Line,

Nor all your Tears wash out a Word of it.' "

Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 177 (Ala. 1991) (Houston, J., disagreeing with the rationale but concurring in the result).

Smith v. Schulte and *Schulte v. Smith*

ALMON, JUSTICE (concurring in part and concurring in the result in part).

I concur in Part I.B., holding that § 6-5-547 violates the right to trial by jury as guaranteed by § 11 of the Alabama Constitution, and I concur in Part II, affirming the judgment on condition of a remittitur. I concur only in the result of Part I.A., holding that § 6-5-547 violates the right to equal protection of the laws as guaranteed by the Alabama Constitution.

Smith v. Schulte and *Schulte v. Smith*

COOK, JUSTICE (concurring except as to Part I.B.).

I concur in all respects with the majority opinion, except as to Part I.B., which holds that Ala. Code 1975, § 6-5-547, violates Ala. Const. 1901, § 11. Our holding, in

Part I.A., that § 6-5-547, Ala. Code 1975, violates the equal protection guarantee of the Alabama Constitution, obviates discussion of § 11. Therefore, I do not join Part I.B., and I express no opinion as to whether § 6-5-547 violates the right to trial by jury.

Smith v. Schulte and *Schulte v. Smith*

MADDOX, JUSTICE (dissenting).

Justice Houston, in his dissent, shows why he concludes that the framers of the Alabama Constitution in 1901 specifically omitted an "equal protection" clause from the Alabama Constitution. I believe that he is correct, because I have read the debates of the delegates to the 1901 Constitutional Convention on the question, and those debates show that a majority of the delegates did not want to include an equal protection clause in the Alabama Constitution. They specifically did not want to accord any further guarantee of equal protection than was given under the provisions of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

The reasoned debate between the Justices of this Court on the question whether the Alabama Constitution has an "equal protection" clause would seem to be more academic than germane, except for the fact that this plaintiff has specifically framed the constitutional issue so as to assert his alleged equal protection rights under the *Alabama Constitution* and has strategically not asserted any violation of his *federal constitutional rights*, so as to

prevent a review by the United States Supreme Court. He has every right to do this, but he must live with his choice.[8]

Justice Houston is absolutely correct in stating that this Court, when discussing the equal protection question posed in *Pickett v. Matthews*, 238 Ala. 542, 192 So. 261 (1939), did so by taking Sections 1, 6, and 22 of the Alabama Constitution and construing those Sections together with the *Fourteenth Amendment* to answer the constitutional issue there involved, the constitutionality of Alabama's so-called Guest Statute. *Pickett v. Matthews* was cited in *Peddy v. Montgomery*, 345 So.2d 631 (Ala. 1977), as standing for the proposition that the Alabama Constitution contained an "equal protection" clause, but, as Justice Houston correctly points out, that was an incorrect reading of *Pickett v. Matthews*.

Smith v. Schulte and *Schulte v. Smith*

HOUSTON, JUSTICE (dissenting).

I address Justice Kennedy's special writing before I address the majority opinion.

While doing legal research to vote on *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156 (Ala. 1991), I found that the

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[8] Sometimes litigants will deliberately not seek to claim a federal constitutional right, believing that their individual State courts will afford them more relief than the United States Supreme Court would under the Federal Constitution. Apparently, that is the strategy of the plaintiff in this case.

equal protection clause that had appeared in the 1868 and 1875 Alabama Constitutions had been deleted from the Constitution of Alabama of 1901. I further found that this Court had acknowledged that in *Opinion of the Justices No. 102*, 252 Ala. 527, 530, 41 So.2d 775, 777 (1949):

> "We point out that there is no equal protection clause in the Constitution of 1901. The equal protection clause of the Constitution of 1875 was dropped from the Constitution of 1901."

I read the minutes of the Constitutional Convention of 1901 and found that the delegates intended for there to be no equal protection clause in the Alabama Constitution. I read the 1977 case, *Peddy v. Montgomery*, 345 So.2d 631 (Ala. 1977), the rock on which the concept of equal protection under the Alabama Constitution was founded. I then read *Pickett v. Matthews*, 238 Ala. 542, 192 So. 261 (1939), the case *Peddy v. Montgomery* had relied upon for the proposition that there was in equal protection clause in the Alabama Constitution. I realized that *Peddy v. Montgomery* had misquoted *Pickett v. Matthews* by leaving out the reference in *Pickett* to the Fourteenth Amendment to the United States Constitution as the source for equal protection in Alabama. I then read Art. I, §§ 1, 6, and 22, of the Alabama Constitution and realized that no clear, unambiguous language in these sections authorized this Court to strike down a duly enacted statute based upon an Alabama equal protection provision. To me, the word "free" has many meanings (for example, not a slave; not subject to arbitrary interference by a government; not detained by governmental officials); and the word "independent" has at least two meanings (self-reliant and free from control of another). To me, the phrase "equally free

and independent" does not clearly and unambiguously mean that "all men" are entitled to "equal protection of the laws" (Fourteenth Amendment, United States Constitution) or possess "equal civil and political rights."[9] (Article I, § 2, Constitution of Alabama of 1875).

In my concurrence in the result in *Moore v. Mobile Infirmary Ass'n*, I wrote to this, because four Justices on the Court were purporting to strike down a tort reform statute dealing with compensatory damages in medical malpractice cases as unconstitutional under what I perceived to be a "phantom" equal protection clause of the Alabama Constitution; and I also did the appellate justices' *mea culpa* for my prior mistakes that Justice Kennedy alludes to:

> " 'As strongly as we believe in the stability of the law, we also recognize that there is merit, if not honor, in admitting prior mistakes and correcting them.' "

592 So.2d at 178, citing *Jackson v. City of Florence*, 294 Ala. 592, 598, 320 So.2d 68, 73 (1975).

I. Equal Protection under the Constitution of Alabama of 1901.

A.

The equal protection challenge in this case is based *solely* on whatever guarantee of equal protection may be afforded by the Constitution of Alabama of 1901. There is

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[9] *Pinto v. Alabama Coalition for Equity*, [Ms. 1931030, May 19, 1995] ___ So.2d ___ (Ala. 1995) (Houston, J., concurring in the result).

none. Alabama citizens are protected only by the equal protection provision in the Fourteenth Amendment to the United States Constitution. See *Pinto v. Alabama Coalition for Equity*, [Ms. 1931030, May 19, 1995] ___ So.2d ___ (Ala. 1995) (Houston, J., concurring in the result); *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156, 174-78 (Ala. 1991) (Houston, disagreeing with the rationale of the Court's Opinion, but concurring in the result); *Ex parte Bill Salter Advertising*, [Ms. 1931349, March 3, 1995] ___ So.2d ___ (Ala. 1995) (Houston, J., concurring specially); *Ex parte St. Vincent's Hospital*, 652 So.2d 225, 230-31 (Ala. 1994) (Houston, J., concurring specially); *City of Birmingham v. Davis*, 613 So.2d 1222, 1225 (Ala. 1992) (Houston, J., concurring specially in the denial of rehearing); *Ex parte Bunting Plastic Surgery Clinic*, 624 So.2d 1075, 1076 (Ala. 1993) (Houston, J., concurring specially); *Ex parte Bronner*, 623 So.2d 296, 300 (Ala. 1993) (Houston, J., concurring in the result); *Jordan v. Reliable Life Insurance Co.*, 589 So.2d 699, 703 (Ala. 1991) (Houston, J., concurring specially).

Erroneous interpretations of judicial decisions or of statutes can become precedent, and when they do they are followed under the doctrine of stare decisis. However, the separation of powers provisions of the Constitution of 1901 (Art. III, §§ 42, 43) will not permit this Court to strike down a statute, duly enacted by the legislature, by use of a nonexistent constitutional right created only by judicial error.

B.

Even if I thought there was an equal protection provision in the Constitution of Alabama of 1901, I would hold

that the statute in question does not violate such a provision. *Reese v. Rankin Fite Memorial Hospital,* 403 So.2d 158 (Ala. 1981).

The first task for any court assessing the constitutionality of a statute under any equal protection challenge is to determine the proper standard of scrutiny to be applied. While the per curiam opinion repeats the oft-heard claim that equal protection analysis under the Alabama Constitution's phantom equal protection clause "does not parallel . . . an analysis based on the Equal Protection Clause of the Fourteenth Amendment," Alabama state equal protection case law has somehow developed into a three-tiered analysis remarkably similar to the analysis under Federal equal protection law. Choosing to completely ignore earlier cases such as *Reese v. Rankin Fite Memorial Hospital,* supra, this Court has created this three-tiered system, while refusing to acknowledge its existence or to clearly delineate when and where these different tests apply. This body of case law has created a legal and analytical quagmire and has given this Court almost limitless discretion in striking down duly enacted laws. See *Moore v. Mobile Infirmary Ass'n,* 592 So. 2d 156, 170 (Ala. 1991).

The highest level of scrutiny applied in equal protection analysis is "strict scrutiny." This Court, in the case of *Indian Rivers Community Health Center v. City of Tuscaloosa,* 443 So. 2d 894 (Ala. 1983), held that if a statutory classification adversely affects a suspect class or abridges a fundamental right, then the proper constitutional standard to be applied is the "strict scrutiny" test, which requires that the challenged law be narrowly tailored to the furtherance of a compelling governmental interest in

order for the law to be upheld. *Id.* at 896. The lowest level of equal protection scrutiny is "rational basis" scrutiny. The case of *Reese v. Rankin Fite Memorial Hospital*, supra, sets out Alabama's version of rational basis scrutiny, stating that, for a statute "[t]o withstand an equal protection challenge, the Court need only find that the classification made by the legislature is not arbitrary or unreasonable." 403 So.2d at 161.

By the application of language from a substantive due process case (*Mount Royal Towers, Inc. v. Alabama Board of Health*, 388 So.2d 1209 (Ala. 1980)), this Court has also developed an intermediate level of equal protection scrutiny. In *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 166 (Ala. 1991), in applying state equal protection analysis to determine the constitutionality of a tort reform statute capping noneconomic *compensatory* damages in medical malpractice cases, the Court held as follows:

> "[W]hether the classifications created under § 6-5-544(b) represent a reasonable exercise of legislative power depends on whether they are reasonably related to the stated objective, and *whether the benefit bestowed upon society outweighs the detriment to private rights occasioned by the statute. Mount Royal Towers, Inc. v. Alabama Bd. of Health*, [supra]. . . . "

(Emphasis added.) The case on which the majority opinion in *Mobile Infirmary* had been based, in applying substantive due process, not equal protection analysis, held that "where legislation affects *protected economic interests or liberties*, it must be tested against the public purpose sought to be served, and there must be a legitimate bona fide relationship between a permissible public purpose

and legislation passed to further that end." *Mount Royal Towers, Inc. v. Alabama Bd. of Health,* 388 So.2d at 1214 (emphasis added).

In applying the various lines of cases to the present case, it is obvious that the only applicable standard is the *Reese* rational basis test. Because the statute in question does not adversely affect a suspect class[10] and does not abridge any fundamental right, no credible argument can be made for the application of strict scrutiny to that statute. The case of *Breed v. Atlanta B. & C. R. R.,* 241 Ala. 640, 4 So. 2d 315 (1941), held that a criminal conviction and sentence of life imprisonment did not deprive a defendant of his "natural right to life" and, therefore, that the family of such a person could sue for wrongful death under Alabama's statute. 241 Ala. at 642, 4 So.2d at 316. It did not hold that "citizens enjoy a fundamental right not to be deprived of liberty and life as a consequence of fatal malpractice," as this Court today incredibly suggests, ___ So.2d at ___ (emphasis omitted). Fundamental rights exist only to protect citizens against intentional deprivations of liberty or legitimate property interests *by the government.* Laurence H. Tribe, *American Constitutional Law,* § 16-8, page 1455 (1988). No one has a fundamental right not to be injured by a fellow private citizen. Persons injured by private citizens must look to state tort law for redress, not

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[10] *Indian Rivers Community Health Center v. City of Tuscaloosa,* 443 So. 2d 894 (Ala. 1983) ("the traits which characterize a suspect class . . . include a history of disenfranchisement and stereotyping, and 'an immutable characteristic determined solely by the accident of birth' ") (citing *Frontiero v. Richardson,* 411 U.S. 677, 686, 93 S.Ct. 1764, 1770, 36 L.Ed.2d 583 (1973)).

to state constitutional law. The question here then is whether any governmental action has deprived the plaintiff of his "natural right to life."

Wrongful death statutes come into play only after a death has occurred. Wrongful death statutes, like many other laws and regulations, seek to preserve "life [through the] prevention of its destruction by the wrongful acts or omission of another." *Breed v. Atlanta B. & C. R. R.*, 241 Ala. at 642, 4 So. 2d at 316-17. How can anyone truly argue that by capping wrongful death damages at $1,000,000 plus annual C.P.I. adjustments, the State has deprived anyone of his or her life? The connection between any lessening of the wrongful death statute's deterrent effect and the loss of any individual's life is too attenuated. The present Court's logic could just as easily be applied to a bill raising the speed limit or to the easing of a governmental regulation controlling the use of pesticides on fruit.[11] Any of these actions can be argued statistically to contribute to the death of some small number of persons over a number of years. Furthermore, in terms of actual deterrence, are not criminal laws dealing with involuntary manslaughter and vehicular homicide much greater deterrents to the taking of others' lives?[12] Using the majority's logic, one must ask whether

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[11] Now Justice Anthony Kennedy, while he was sitting on the Ninth Circuit Court of Appeals, rejected this same fundamental rights argument, stating that the argument's "logic would apply to all areas of civil law in every state, and all civil remedies would be subject to the strictest standard of review." *In re Paris Air Crash*, 622 F.2d 1315, 1319 (9th Cir. 1980).

[12] "The criminal justice system exists to deter the taking of life and provides a much greater deterrent than a punitive

this Court will have to strike down any law that reduces even slightly the jail terms mandated for such crimes?

Numerous courts, both federal and state, have rejected the argument that there is a fundamental right to recover damages in wrongful death actions. A number of these cases dealt with equal protection challenges to the total prohibition of punitive damages recoveries in wrongful death actions based on both the federal and respective state equal protection guarantees.[13] Other cases have rejected the same fundamental rights argument in the context of limiting the amount of recovery.[14]

Neither is there any merit in this Court's argument that the statute seeks to deprive anyone of any property interest. The majority writes that "[t]he notion that the lives of some of Alabama's citizens are worth *less* than the lives of others is an idea that carries the *gravest of implications.*" ___ So.2d at ___ (emphasis original). The majority seems to forget that this Court has interpreted Alabama's

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damage award to heirs of a decedent against a guilty party, which award under most circumstances involving homicide would likely be difficult to collect." *Johnson v. International Harvester Co.*, 487 F. Supp. 1176, 1179 (D.N.D. 1980).

[13] See, e.g., *Johnson v. International Harvester Co.*, 487 F. Supp. 1176 (D.N.D. 1980); *In re Paris Air Crash*, 622 F.2d 1315 (9th Cir. 1980); *In re Air Crash Disaster Near Chicago, Ill.*, 644 F.2d 594 (7th Cir. 1981); *Smith v. Printup*, 254 Kan. 315, 866 P.2d 985 (1993); *Berman v. United States*, 572 F. Supp. 1486 (N.D. Ga. 1983); *Lynch v. Port of Houston Authority*, 671 S.W.2d 954 (Tex. App. 1984).

[14] See, e.g., *Potomac Electric v. Smith*, 79 Md. App. 591, 558 A.2d 768 (1989); *Blue Cross of Massachusetts v. Tavaline*, 398 Mass. 582, 499 N.E.2d 1195 (1986).

Wrongful Death Statute as allowing the recovery of only punitive damages.[15] See, e.g., *Killough v. Jahandarfard*, 578 So. 2d 1041, 1044 (Ala. 1991). Therefore, Alabama's Wrongful Death Statute does not value life; it, like a host of other regulatory devices, seeks to punish culpable conduct and therefore to "stimulate diligence and check violence, in order thereby to give greater security to human life." *Breed v. Atlanta B. & C. R. R.*, 241 Ala. at 642, 4 So. 2d at 316. The *Breed* Court further held:

> "*The right of action* which the statute gives *is a new right*, not derivative nor the right of succession to the person slain. It is *not a right of property*, and the *personal representative* in bringing and prosecuting the suit *acts as an agent of legislative appointment for the effectuation of the public policy* it declares – the prevention of homicides."

241 Ala. at 642, 4 So.2d at 317. (Emphasis added.) (Citations omitted.) Not only does the nature of Alabama's wrongful death recovery further weaken any argument that the classification abridges a fundamental right, it also disposes of any argument for the application of the *Mobile Infirmary* intermediate scrutiny standard.

The application of this intermediate level of scrutiny depends on a finding that the challenged classification "affects protected economic interests or liberties." *Mount Royal Towers v. Alabama Bd. of Health*, 388 So. 2d 1209, 1214

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[15] I have disagreed with the majority's reasoning (see *Tatum v. Schering Corp.*, 523 So.2d 1042, 1047-63 (Ala. 1988) (Houston, J., dissenting); however, because no constitutional phantom, but only statutory construction, is involved, I no longer dissent on this issue.

(Ala. 1980). Because, as the *Breed* decision clearly holds, there is "not a right of property" in the recovery of wrongful death damages in Alabama, there are no "private rights" to be balanced against the "benefit sought to be bestowed upon society," as required for the application of the *Mobile Infirmary* intermediate level of equal protection scrutiny. *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d at 166. Because neither Alabama's line of equal protection cases applying a fundamental rights analysis nor its cases applying intermediate level scrutiny apply to the present case, the proper standard of equal protection scrutiny is rationality scrutiny as defined and applied by *Reese v. Rankin Fite Memorial Hospital*, 403 So. 2d 158 (Ala. 1981), and its progeny.

Reese v. Rankin Fite Memorial Hospital, 403 So.2d at 160-62, involved a statute enacted as part of the Medical Liability Act. This statute was challenged as violating equal protection provisions of the Alabama Constitution and the United States Constitution. Justices Maddox, Almon, and Shores, the only present members of the Court who were Justices at that time, concurred in the per curiam opinion, which held:

> "To withstand an equal protection challenge, the Court need only find that the classification made by the legislature is not arbitrary or unreasonable. As this Court recently held in *Tyson v. Johns-Manville Sales Corporation*, 399 So.2d 263 (Ala. 1981):
>
> > " 'A statutory discrimination between classes is held to be relevant to a permissible legislative purpose if any state of facts reasonably may be conceived to justify it.'

> "The Medical Liability Act was the legislature's response to a crisis which developed nationwide in the 1970's. We cannot say that the equal protection provisions of the Constitution restrict its authority to withdraw the legislative grace given minors in § 6-2-8 in the field of medical malpractice claims.
>
> ". . . .
>
> "We hold that the Medical Liability Act does not offend either the due process or the equal protection provisions of the state or federal [constitution]."

403 So.2d at 161-62.

This case and the cases following it (see, e.g., *Ex parte DeMent*, 424 So.2d 659, 661 (Ala. 1982); *Bowlin Horn v. Citizens Hospital*, 425 So.2d 1065, 1072-73 (Ala. 1982); *Home Indemnity Co. v. Anders*, 459 So.2d 836, 840-41 (Ala. 1984)) have not been expressly overruled by the majority opinion; however, there is no way to reconcile the legal reasoning and the results reached in those cases with the majority opinion in this case.

In Ralph D. Gaines, Jr., and William K. Hancock, *Tort Reform in Alabama: A Proponent's Perspective*, 18 Cumb. L. Rev. 649, 661-62 (1988), the following appears:

> "Regarding an equal protection challenge to the disparate definitions, an analogy can be drawn to legislation that abolishes the collateral source rule only for actions against health care providers. The Medical Liability Act's definition applies equally to all the members of the class affected. Therefore, no member of the class is deprived of the protection of the law extended to other members of the class.

> "Alabama case law resolves the equal protection issue. In *Reese v. Rankin Fite Memorial Hospital*, the Alabama Supreme Court held that legislation providing for a different statute of limitations for minors injured through medical malpractice did not violate the equal protection right of the minors. Provided that such legislation does not create a suspect classification, it survives equal protection scrutiny so long as the legislation is not found to be arbitrary or unreasonable. [Ala. Code 1975, § 6-5-540.] This statement indicates that the legislature sought to ameliorate a perceived diminution in the availability of adequate health care. Certainly, this goal is not unreasonable. The substantial evidence definition might further that legislative goal by reducing the cost of medical insurance, thereby reducing the cost of health care for Alabamians."

II. Denial of Right to Trial by Jury

> "We are often most in the dark when we are most certain, and the most enlightened when we are the most confused."

Dr. M. Scott Peck, *The Road Less Traveled* 285 (Simon & Schuster, 1978).

If Dr. Peck is correct, then for me, enlightenment hath wrought its masterpiece, for never have I been so confused as to what violates Article I, § 11, of the Constitution of Alabama of 1901.

During oral argument, Smith's attorney conceded that a wrongful death action is purely statutory and is not recognized by the common law as being among its old

and settled proceedings. The Alabama Wrongful Death Statute was enacted after Alabama's first constitution was adopted, but before the ratification of the 1901 Constitution. Therefore, by the authority of *Ex parte Giles*, 632 So.2d 577, 580-81 (Ala. 1993), this Court should hold that § 6-5-547 does not violate § 11.

In *Gilbreath v. Wallace*, 292 Ala. 267, 270, 292 So.2d 651, 653 (1974), this Court declared: "Alabama's Constitution effected a 'freezing' of the right to jury trial as of 1901.' "

> "When the Constitution of 1901 was ratified, the power was expressly conferred in juries to impose the sentence of death or life imprisonment for defendants found guilty of murder in the first degree (Ala. Code 1897, § 4858); to impose the term of imprisonment for defendants found guilty of murder in the second degree (§ 4858), manslaughter (§ 4862), rape (§ 5444), robbery (§ 5479), and other offenses (§§ 5050, 4420, 4758); and to fix and determine the amount of the fine that a convicted felon had to pay (§ 5415). Section 1205 of Act No. 607, Acts of Alabama 1977 (now codified at Ala. Code 1975, §§ 13A-5-1 through 13A-5-59), removed from the jury the right to sentence and to fix and determine the amount of fines."

Henderson v. Alabama Power Co., 627 So.2d 878, 905 (Ala. 1993) (Houston, J., dissenting).

Thus, the right of a jury to sentence in a criminal case and the right to have a jury award damages in a civil wrongful death case were not in existence when the *first* Alabama Constitution was adopted, but did exist at the time of the ratification of the 1901 Constitution.

In *Gilbreath*, this Court wrote:

> "In *Alford v. State [ex rel. Attorney General*, 170 Ala. 178, 54 So. 213 (1910)], the court quoted from *Tims v. State*, [26 Ala. 165 (1855)], and set forth *the principle as it applies to both civil and criminal cases:*
>
> > " 'The right [trial by jury] is confined to those classes of cases in which the right existed at common law, or in which it was used at the time of the adoption of the Constitution. Where there have been several Constitutions, the right is in reference to its existence at the time of the adoption of the last one.' "

292 Ala. at 270, 292 So.2d at 653. (Emphasis added.)

I cannot follow the reasoning of the majority opinion in *Giles*, unless it adopted what it quoted, apparently with approval, from *Crowe v. State*, 485 So.2d 351, 364 (Ala.Crim.App. 1984), rev'd on other grounds, *Ex parte Crowe*, 485 So.2d 373 (Ala. 1985):

> "We must agree with the above authorities and hold that Article I, Section 11, confers *the right of trial by jury as existed at common law and the time of Alabama's first state constitution*. This provision did not incorporate the statutes conferring sentencing authority upon the jury which were in force at the time of the adoption of the 1901 Alabama Constitution."

Ex parte Giles, 632 So.2d at 580. (Emphasis added.)

What, pray tell, did *Giles* do if it did not overrule *Gilbreath*, at least as it applied to criminal law? "[W]e reaffirm the principle that, in Alabama, the 'judge, and

not the jury, is the final sentencing authority in criminal proceedings.'" 632 So.2d at 583. Because the jury had sentencing authority when the Constitution of 1901 was ratified, this overruled *Gilbreath* as effectively as the suggested sentence in the majority opinion in the present case: "Had we intended to abrogate that rule, the short answer to Giles's challenge would have been to reject it forthrightly, briefly stating: 'We hereby overrule *Gilbreath* to the extent it holds that § 11 freezes the right to a trial by jury as it existed *by statute* in 1901.' " ___ So.2d at ___ (emphasis original).

In *Giles*, 12 jurors *did not unanimously* sentence Giles to death. In 1901 in Alabama, jurors imposed sentences in capital cases. Traditionally, § 11 of the Constitution ("[t]hat the right to trial by jury shall remain inviolate") restricted the legislature and the courts (not only does § 11 restrict courts, but § 6.11 of Amendment No. 328 also restricts the courts) from attempting to change the number of jurors, the impartiality of jurors, and *the unanimity of jurors*. *Kirk v. State*, 247 Ala. 43, 22 So.2d 431 (1945); *Baader v. State*, 201 Ala. 76, 77 So. 370 (1917); Judge Walter B. Jones, *Trial by Jury in Alabama*, 8 Ala.L.Rev. 274, 277 (1956). In *Giles*, the majority of this Court changed the requirement that a jury's verdict be unanimous in a situation in which a unanimous jury verdict would have been required at the time of the ratification of the 1901 Constitution, by using much rhetoric and little reason.

Ex parte Giles, 632 So.2d 577, 583 (Ala. 1993), overruled *Gilbreath v. Wallace* as it applied to criminal law by holding: "[W]e reaffirm the principle that, in Alabama, the 'judge, and not the jury, is the final sentencing authority in criminal proceedings.' "

In the majority opinion in the present case, the following sentence appears: "Apparent, therefore, from a thorough reading of *Ex parte Giles* is the fact that this Court did not, as the defendants contend and as Justice Houston's dissent suggests, overrule that basic *Gilbreath* principle." ___ So.2d at ___.

If that statement in the majority opinion is correct, then I am confused (enlightened per Dr. Peck) as to why today's judgment by the majority of this Court does not violate the equal protection rights under the Fourteenth Amendment to the United States Constitution (which are the only legitimate equal protection rights guaranteed to Alabamians) and the due process guarantees under both the United States and Alabama Constitutions of either Arthur Lee Giles and other criminal defendants or Dr. Schulte and other civil defendants, who rely on Alabama Tort Reform legislation. If a double standard has *not* been created, then the majority of this Court has returned to a pre-*Giles* interpretation of *Gilbreath v. Wallace*, having paused long enough to carve out a single exception to the rule stated in *Gilbreath v. Wallace* for the purpose of upholding Giles's death sentence.

My confusion (enlightenment) concerns what is going to happen in future capital cases in which a jury does not unanimously sentence to death but the trial court does sentence to death (which is permissible under Alabama law, assuming that it is not unconstitutional under the state constitution, see *Ex parte Harris*, [Ms. 93-7659, February 22, 1995] ___ U.S. ___, ___ S.Ct. ___ (1995)); and what is going to happen in those noncapital cases based on crimes for which a jury, at the time of the

ratification of the 1901 Constitution, imposed the sentence, e.g., murder, manslaughter, rape, robbery, and other offenses (see Ala. Code 1897, §§ 4858, 4862, 5444, 5479, 5050, 4420, 4758). Effective 12:01 a.m. on July 1, 1981, pursuant to legislation (enacted as § 6-5-547 was enacted), the power to sentence was removed from the jury and invested in the trial court (Ala. Code 1975, §§ 13A-5-1 through 13A-5-59).

I raised these questions in my dissent in *Henderson v. Alabama Power Co.* and in my concurrence in the result in *Ex parte Giles*. Now, by resurrecting the rule in *Gilbreath v. Wallace* to strike down another tort reform statute, the majority of this Court has come full circle and must, in future cases, address the fundamental question of who has the authority under the Constitution of Alabama to sentence in criminal cases, including capital cases, or face an equal protection and due process challenge to the way the majority of this Court interprets § 11 of the Alabama Constitution. For these reasons, I strongly dissent.

[Rendered August 18, 1995]

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

WOODROW SMITH, as Administrator of the Estate of Annie Jo Smith, Deceased,	*	
Plaintiff,	*	CIVIL ACTION NUMBER
vs.	*	
WILLIAM J. SCHULTE, M.D.; PULMONARY ASSOCIATES OF MOBILE, P.A., et al.,	*	CV-90-001334
Defendants.	*	

ORDER RE: POST-JUDGMENT MOTIONS AND VALIDITY OF § 6-5-547

This matter comes before the Court on defendants' motions for JNOV, new trial, and remittitur, as well as plaintiff's motion to declare unconstitutional *Alabama Code* § 6-5-547 and defendants' motion to apply § 6-5-547. The parties and the Court extended the time for a ruling on these post-judgment motions until December 15, 1993.

I. DEFENDANTS' POST-JUDGMENT MOTIONS

A. Motions For JNOV and New Trial

The jury assessed $4.5 million in punitive damages against Dr. Schulte and Pulmonary Associates for the wrongful death of plaintiff's wife. Pursuant to *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), the Court conducted a hearing, accepted evidence from both parties, and heard oral arguments from the attorneys. After careful consideration of the arguments of counsel and the

evidence admitted, both at trial and at the *Hammond* hearing, the Court finds and rules that said motions for JNOV and new trial are due to be, and hereby are, DENIED.

With respect to Dr. Schulte's motion for JNOV, the Court finds that there was substantial evidence on each material element of the plaintiff's causes of action. (The evidence supporting plaintiff's claims is discussed in the section dealing with remittitur, *infra*.) With respect to Dr. Schulte's motion for new trial, the Court finds that the jury's verdict was not tainted or influenced by bias, passion, prejudice, corruption, or other improper motive or cause. *Hammond*, 493 So. 2d at 1378; *Wilson v. Dukona Corp. N.V.*, 547 So.2d 70, 73 (Ala. 1989). Defendants have not identified any event which occurred during the trial which might have impugned the jury's decision-making process. Moreover, the Court finds that the verdict is not against the great weight and preponderance of the evidence. To the contrary, the Court finds that the jury's verdict is fully consistent with the evidence submitted by the plaintiff in the case.

B. Motion For Remittitur

Regarding defendants' motion for remittitur, the issue is whether the jury's verdict is excessive as a matter of law. Because a jury's verdict is constitutionally protected,[1] a trial court may not interfere with it unless it is

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[1] *See* Ala. Const. Art. I, § 11; "[A] jury verdict may not be set aside unless the verdict is flawed, thereby losing its constitutional protection." *Hammond*, 493 So. 2d at 1378.

flawed as a matter of law. As defendants recognize in their brief, a jury's verdict for punitive damages may be remitted only if the verdict punishes the defendant too severely for his misconduct. *Green Oil Co. v. Hornsby*, 539 So.2d 218, 221 (Ala. 1989); *Industrial Chemical and Fiberglass Corp. v. Chandler*, 547 So.2d 812, 837 (Ala. 1988) (" 'punitive damages . . . must not exceed an amount that will accomplish society's goals of punishment and deterrence' ").

Hence, the Court must determine whether the amount of the jury's verdict will punish defendants too severely for their misconduct. Under Alabama law, the defendants bear the burden of proving excessiveness. *McDowell v. Key*, 557 So. 2d 1243, 1249 (Ala. 1990). It is not sufficient for defendants to simply allege excessiveness; they must prove it by submitting evidence that "will justify interference" with the jury's constitutionally-protected verdict. *Fuller v. Preferred Risk Life Ins. Co.*, 577 So.2d 878, 886 (Ala. 1991); *Associates Financial Services Co. of Alabama, Inc. v. Barbour*, 592 So.2d 191, 198-99 (Ala. 1991).

Defendants bear the burden of proof because an excessiveness claim challenges the validity of a constitutionally-protected judicial finding (i.e., the jury's verdict). Ala. Const. Art. I, § 11. When a defendant challenges a jury's verdict on excessiveness, he is essentially claiming that "the verdict deprives [him] of property without due process of law under § 13 [of the Alabama Constitution]." *Fuller v. Preferred Risk Life Ins. Co.*, 577 So.2d 878, 885 (Ala. 1991). As the Alabama Supreme Court observed in *Industrial Chemical*:

> "Nothing prevents the defendant . . . from presenting evidence to prove one or more of the above considerations [Hammond factors], and, by doing so, to guarantee that his right to due process of law in regard to the jury's award is protected. In sum, 'fundamental fairness' requires that defendant be given the opportunity to present proof to the trial court during post-judgment review of the verdict that the award is unreasonable, disproportionate, or economically destructive . . . "

547 So.2d at 838.

Thus, the *Hammond/Green Oil* analysis involves the balancing of two competing constitutional concerns: the constitutional protection afforded the jury's verdict on the one hand and the defendant's right not to be deprived of property without due process on the other. However, in order to succeed on a motion for remittitur, the defendant must submit sufficient evidence to *"justify interference"* with the verdict. If he is unable to do this, the Court cannot interfere with the verdict.

In this case, defendants have not shown that the jury's verdict, if not remitted, will deprive them of property without due process of law, i.e., that they will be punished more severely than necessary to accomplish society's goals of punishment and deterrence. Each of the *Hammond/Green Oil* factors identified by the Alabama Supreme Court are discussed below in the same four-step analysis followed by this Court in *Principal Financial Group v. Thomas*, 585 So.2d 816, 817-18 (Ala. 1991).[2]

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[2] The *Hammond/Green Oil* factors fall into four broad categories: (1) impact of the verdict upon the defendant if not

1. Severity of Defendants' Conduct

Regarding the severity of the defendants' conduct, the Court finds that, although their lawyers did a splendid job defending them, defendants' misconduct was reprehensible in the extreme. The record contains a superabundance of evidence that Dr. Schulte's neglect of his esophageal intubation of Mrs. Smith was fatal and inexcusable. Further, while Dr. Schulte made damning admissions to Mrs. Smith's husband and daughter during the 24-hour period following Mrs. Smith's death, these episodes of contrition and candor were as fleeting as they were telling. During the trial itself, Dr. Schulte and his witness were so impeached that the jury reasonably could have concluded that the defendants were obsessed with self preservation, untempered by any remaining sense of contrition, to the utter exclusion of any duty of candor. The demeanor of Dr. Schulte and his witnesses and the substance of their testimony gave the distinct impression that they had formulated their positions with the expectation that plaintiff's counsel would be unable to discover the evidence of the cause of Mrs. Smith's death, to comprehend the evidence, and to make the jury comprehend it.

The defendants' only saving grace was their trial counsel, whose obvious personal good faith, good will,

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remitted; (2) severity of the defendant's conduct; (3) mitigating factors; and (4) results in other cases. *See, Post-Judgment Review of Punitive Damages: A Four-Step Approach To Hammond and Green Oil*, 11 Ala. Trial Law. Jour. 26 (Summer, 1991). In *Thomas*, the Court called an order employing this approach "excellent" and "thorough and scholarly". *Id.* at 817-18.

dedication, and respectability apparently mollified the jury and restrained it from meting out stiffer punishment. The Court's impressions of the defendants' misconduct derive from the trial and the evidence presented to the jury, not from the post-trial discovery, which serves only to verify what was already apparent. Further, the record contains evidence from which the jury reasonably could have concluded that disastrous esophageal intubations are a public problem requiring not only punishment to the wrongdoers on trial but also effective deterrence to others similarly situated and similarly inclined. These circumstances support the jury's assessment of the quantum of punishment and deterrence.

2. Impact of Verdict If Not Remitted

Defendants each have $1,000,000 in liability insurance with Mutual Assurance for a total of $2 million in insurance. [Ex. 12 to Schulte Depo; Ex. 9 to Sirmon Depo]. Dr. Schulte has $438,600 in personal assets (excluding the $245,000 in debt on his two houses) and earned $127,158 in adjusted gross income in 1988, $174,330 in adjusted gross income in 1989, $354,877 in adjusted gross income in 1990, $395,627 in adjusted gross income in 1991, and $377,173 in adjusted gross income in 1992.

Pulmonary Associates of Mobile had a net Stockholders' Equity of $147,003.06 at the end of its fiscal year on September 30, 1992, [Sirmon Depo. at 9], had physical assets which cost $597,059 and had a net book value of $159,650.02 on September 30, 1993, [Ex. 1 to Sirmon Depo at 12; Sirmon testimony at 13], and had accounts receivable of "approximately a couple of a million dollars",

which have an historic collectability factor of 68%. [Sirmon Depo. at 19]. Since the time its last financial statements were created, Pulmonary Associates purchased a computer system which cost in excess of $80,000. [Sirmon Depo. at 15]. Pulmonary Associates has a compensation structure "whereby we actually compensate and pay out of the profits of the firm in their entirety every year." [*Sirmon Depo.* at 16]. There are four equal shareholders in the group, Drs. Schulte, McAtee, Saucier and Gottlieb. For the fiscal year ending September 30, 1992, Pulmonary Associates' gross collections were $3,802,616. [Sirmon Depo. at 23].

In short, it clearly appears that the defendants can survive the verdict financially by applying existing assets and a part of future income.

3. Mitigating Factors

Defendants have not submitted any evidence mitigating in favor of remittitur. Defendants have not shown that they will suffer any criminal sanctions as a result of the subject conduct, nor that there are other civil actions arising out the same misconduct. Hence, none of these factors weighs in favor of remittitur.

4. Comparative Analysis with Other Cases

Finally, a comparative analysis of the jury's verdict in this case with other wrongful death verdicts affirmed by

the Alabama Supreme Court reveals that the jury's verdict is not so large as to be inconsistent with cases involving similar reprehensible misconduct. A list of these verdicts is set out below.

1. *Sears Roebuck & Co. v. Harris* [Ms. 1911519, Sept. 10, 1993], ___ So.2d ___ (Ala. 1993) (Court affirmed $850,000 of $4,650,000 in compensatory damages and all $6,500,000 in punitive damages in case involving three injuries and one death; the wrongful death verdict accounted for $4,000,000 of the $6,500,000 of punitive damages).

2. *Atkins v. Lee*, 603 So.2d 937 (Ala. 1992) ($6,875,000 medical malpractice verdict against hospital and doctor affirmed).

3. *General Motors Corp. v. Johnston*, 592 So.2d 1054 (Ala. 1992) ($15 million products liability verdict remitted to $7.5 million for wrongful death of seven year old boy).

4. *Killough v. Jahandardfard*, 578 So.2d 1041 (Ala. 1991) ($2.5 million verdict against landlord for wrongful death of minor killed in house fire for failure to install smoke detector, affirmed on appeal).

5. *Lakeman v. Otis Elevator Co.*, 930 F.2d 1547 (11th Cir. 1991) ($2.5 million wrongful death verdict against chemical manufacturer in AEMLD case for failure to warn of dangerous propensities of degreaser, affirmed on appeal).

6. *Alabama Power Co. v. Turner*, 575 So.2d 551 (Ala.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2260, 114 L.Ed.2d 713 (1991). ($5 million jury verdict remitted to $3.5 million).

7. *Burlington Northern R.R. Co. v. Whitt*, 575 So.2d 1011 (Ala. 1991) ($15 million jury verdict remitted to $5

million in railroad crossing case alleging negligence and wantonness).

8. *Montgomery Health Care Facility v. Ballard,* 565 So.2d 221 (Ala. 1990) ($2 million jury verdict affirmed in medical malpractice case).

9. *Clardy v. Sanders,* 551 So.2d 1057 (Ala.), *cert. denied,* 483 U.S. 885, (1989) ($2.5 million jury verdict affirmed in automobile case).

10. *Olympia Spa v. Johnson,* 547 So.2d 80 (Ala. 1989) ($3 million jury verdict affirmed for negligent maintenance of a steam room).

11. *Industrial Chemical & Fiberglass Corp. v. Chandler,* 547 So.2d 812 (Ala. 1989) (two wrongful death verdicts for $2.5 million each affirmed for violation of AEMLD against distributor of chemicals).

12. *Central Alabama Electric Coop. v. Tapley,* 546 So.2d 371 (Ala. 1989) ($1 million jury verdict affirmed for electrocution).

13. *Black Belt Wood Co. v. Sessions,* 514 So.2d 1249 (Ala. 1986) ($3.5 million verdict affirmed where log fell off of truck killing on-coming motorist).

14. *Alabama Power Co. v. Cantrell,* 507 So.2d 1295 (Ala. 1986), *appeal dismissed,* 486 U.S. 1028 (1988) ($1 million verdict affirmed for electrocution).

15. *General Motors v. Edwards,* 482 So.2d 1176 (Ala. 1985) (judgments of $1.6 million each affirmed for death of two minors under AEMLD).

16. *Alabama Power Co. v. Marine Builders, Inc.,* 475 So.2d 168 (Ala. 1985) ($3.5 million judgment affirmed for electrocution).

In *General Motors Corporation v. Johnston*, 592 So.2d 1054 (Ala. 1992), the Alabama Supreme Court, in reviewing a $15 million wrongful death award, considered several wrongful death verdicts returned by juries in other jurisdictions, as well as several wrongful death verdicts returned by Alabama juries. The Court's discussion of this issue is quoted fully below:

> "It is now the responsibility of this Court to consider whether the award is excessive. We believe that it is helpful in this regard to compare the facts of this case to those of other cases wherein large sums of punitive damages have been awarded, in order to assure some degree of uniformity. In other jurisdictions, substantial punitive damages awards have been upheld in wrongful death actions. See, e.g., *Mason v. Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991) ($25 million punitive damages award remitted to $12.5 million in a wrongful death action for a misleading warning on Benzene); *O'Gilvie v. International Platex, Inc.*, 609 F.Supp. 817 (D.Kan. 1985), aff'd in part and reversed on other grounds, 821 F.2d 1438 (10th Cir. 1987), cert. denied, 486 U.S. 1032, 108 S.Ct. 2014, 100 L.Ed.2d 601 (1988) ($10 million punitive damages award in products liability action based on death due to toxic shock syndrome found not excessive); *Ford Motor Co. v. Stubblefield*, 171 Ga.App. 331, 319 S.E.2d 470 (1984) ($8 million punitive damages award not excessive where 15-year-old passenger was killed due to fire from rear-end collision and internal memo indicated that the defendant knew of safety hazard and deferred adopting safety measures in order to protect profits); *Channel 20, Inc. v. World Wide Tower Services, Inc.*, 607 F.Supp. 551 (S.D.Tex.

1985) ($5 million punitive damages award to 5 estates was not excessive where evidence showed that deliberate use of cost-cutting measures at the expense of reasonable safety precautions caused the deaths); *Hasson v. Ford Motor Co.*, 32 Cal.3d 388, 185 Cal.Rptr. 654, 650 P.2d 1171 (1982), cert. denied, 459 U.S. 1190, 103 S.Ct. 1167, 75 L.Ed.2d 422 (1983) ($4 million punitive damages award for death due to brake failure not excessive where manufacturer was aware of faulty brakes and did not issue any warnings).

"In *Clardy v. Sanders*, 551 So.2d 1057, the jury awarded the plaintiff $2.75 million in punitive damages against the estate of a driver who, while racing his automobile down the street, pulled into the opposite lane and caused a collision, killing himself and the plaintiff's daughter, who was riding in the other vehicle. This Court upheld the jury award. In *Black Belt Wood Co. v. Sessions*, 514 So.2d 1249 (Ala. 1986), this Court held that the plaintiff's award of $3.5 million in punitive damages, based on the fact that a log fell from a passing log truck and killed the plaintiff's 19-year-old son, was not excessive. The jury in *Olympia Spa v. Johnson*, 547 So.2d 80 (Ala. 1989), awarded $3 million in punitive damages to the plaintiff, whose wife had been burned to death in the defendant's steam room. We affirmed the trial court's order denying a remittitur. More recently, this Court reduced a jury verdict of $15 million in a wrongful death case to $5 million. *Burlington Northern R.R. v. Whitt*, 575 So.2d 1011. In *Whitt*, the driver of a tractor-trailer truck was killed when he pulled into the path of an oncoming train.

> "Based on a thorough review of this case, we are of the opinion that the punitive damages award in this case is excessive and we order a remittitur of $7.5 million. Even though a remittitur is necessary, this Court is of the opinion that the evidence supports a punitive damages award of $7.5 million. We therefore affirm the judgment of the trial court as to the punitive damages award on the acceptance of a remittitur of $7.5 million by the plaintiff Johnston within 28 days of the date of this opinion (January 24, 1992), which will result in a judgment in her favor of $7.5 million.
>
> "Accordingly, as to the award of $15 million in punitive damages, the judgment is affirmed, conditioned upon the plaintiff Johnston's acceptance of a remittitur of $7.5 million as herein ordered. As to the award of $75,000 in compensatory damages to Ford Lewis, the judgment is affirmed."

Id. at 1063-64.

In light of these cases, the jury's verdict in the instant case is not out of line with jury verdicts returned and affirmed in similar cases. Therefore, this *Hammond/Green Oil* factor, like the others, weighs against remittitur.

Conclusion

Regarding defendants' motion for remittitur, defendants have failed to demonstrate that the jury's verdict "exceeds an amount that will accomplish society's goals of punishment and deterrence." *Industrial Chemical*, 547 So.2d at 837. Defendants have not submitted sufficient

evidence to "justify interference" with the jury's constitutionally-protected verdict. To the contrary, it appears that the jury's verdict will fairly punish defendants for their misconduct and will deter others similarly situated from committing similar wrongs in the future. Accordingly, defendants' post-judgment motions for JNOV, new trial and remittitur are due to be denied.

II. PLAINTIFF'S MOTION TO DECLARE § 6-5-547 UNCONSTITUTIONAL

Plaintiff has asked this Court to declare *Alabama Code* § 6-5-547 unconstitutional. Plaintiff's primary arguments are that the section is violative of Plaintiff's right to trial by jury and violative of Plaintiff's right to equal protection.

A. Right to Trial by Jury

Regarding the issue of the constitutionality of § 6-5-547, while the defendants vigorously advance *Garner v. Covington County*, Nos. 1911100, 1911105, 1911150, and 1911151, 1993 WL 222601 (Ala. June 25, 1993), and the plaintiff equally vigorously advances *Henderson v. Alabama Power Co.* Nos. 1901875 and 1901946, 1993, WL 222341 (Ala. June 25, 1993), both of these decisions seem too distinguishable from the case at bar to serve as precedent. The Supreme Court decided *Garner*, which affirmed a cap, "in the context of the unique status of counties and cities as governmental entities." *Garner* at *4. The defendants in the case at bar do not enjoy the unique status of counties or cities; and therefore no such status, crucial to the rationale of *Garner*, supports the constitutionality of

the § 6-5-547 cap on any wrongful death judgment against medical providers.

Likewise, *Henderson*, which declares a punitive damage cap *un*constitutional, is distinguishable as a common-law-claim case. The wrongful death claim in the case at bar is, of course, entirely statutory. While the plaintiff asserts that *Henderson* expressly rejects this distinction, the actual language in *Henderson* is ambiguous. It is:

> This Court has held that the jury trial right protected by § 11 of the 1901 Constitution is the right as it existed at common law; "The right . . . is confined to those classes of cases in which the right existed at common law, or in which it was used at the time of the adoption of the Constitution." *Gilbreath v. Wallace*, 292 Ala. 267, 270, 292 So. 2d 651, 653 (1974), quoting *Alford v. State ex rel.* Attorney General, 170 Ala. 178, 188-89, 54 So. 213, 215-16 (1910) (Mayfield, J., dissenting).

Henderson at *5. Notably, the words of the *Henderson* Court itself limit the ambit of Section 11 to "the right as it existed at common law;" but immediately after those words the *Henderson* Court adopts the language of *Gilbreath v. Wallace*, which includes within the ambit of Section 11 those cases, ostensibly including purely statutory claims, "in which . . . [jury trial] was used at the time of the adoption of the Constitution." *Id.* at *5 (quoting *Gilbreath*, 292 Ala. 267, 270, 292 So. 2d 651, 653 (1974)). Two observations about this ambiguity are appropriate. First, inasmuch as *Henderson* is a common-law-claim case, any words extending its operation to merely statutory claims are *dictum*. Second, *Gilbreath*, which includes statutory claims within the ambit of Section 11 protection, is so

distinguishable from the case at bar as to be on another planet. *Gilbreath* holds only that Section 11 guarantees a twelve-man jury instead of a six-man jury to a party contesting a will in Probate Court.

The plaintiff also relies on *Moore v. Mobile Infirmary Assoc.*, 592 So. 2d 156 (Ala. 1991), as authority for the unconstitutionality of the § 6-5-547 cap. *Moore* declares unconstitutional the Alabama Code § 6-5-544 cap on damages for "non-economic losses." *Moore*, however, is critically distinguishable from the case at bar not only in that *Moore*, like *Henderson*, involves a common law claim rather than a statutory claim but also in that *Moore* involves a "non-economic" but nonetheless *compensatory* award. While the *Moore* plaintiff obviously had vital personal and property rights in her compensatory award, the plaintiff in the case at bar does not have such rights in his punitive award.

Finding no civil precedent holding precisely that the legislature either can or cannot cap the punitive damages recoverable in a wrongful death case, this Court thinks the obvious source of guidance is the criminal law. Even *Gilbreath*, on which the plaintiff relies, opines that Section 11 of the Constitution "applies to both civil and criminal cases", *Gilbreath*, 292 Ala. at 270, 292 So. 2d at 653, and that "In Alabama the basic principles which apply to constitutional juries in criminal cases also apply in civil cases", 292 Ala. at 271, 292 So. 2d at 654. In Alabama neither Section 11 nor any other constitutional provision secures the defendant any right to have the jury assess the defendant's punishment. For every conviction under a criminal statute, whether of common law origin or not, the legislature caps the punishment, the judge assesses

the punishment, and the jury has nothing whatever to say about the punishment, except in capital cases, in which the jury's role regarding the penalty is relegated to a mere "recommendation" of either death by electrocution or life without parole, which recommendation the judge may override.

If the argument be advanced that Subsection 104 (14) of the Alabama Constitution of 1901, coupled with the very last sentence of Section 104 itself, authorizes the legislature to fix "the punishment of crime" and thereby explains why Section 11 of the same Constitution does not guarantee a criminal defendant a jury-fixed penalty, then, by the same argument, Section 104 and Subsection 28 thereof, authorize the legislature to remit "fines, penalties, or forfeitures" and thereby validate *Ala. Code* Section 6-5-547. However, *Henderson*, on which the plaintiff relies, holds that Section 104 of the Constitution does not authorize any legislative encroachment on Section 11. *Henderson* at *13-16. Therefore the current constitutional validity of excluding the jury from any role in fixing most criminal penalties notwithstanding Section 11 does not depend on Section 104 but rather results from the limited nature of the Section 11 guarantee itself.

While the Wrongful Death Act, *Ala. Code* § 6-5-410, in saying the personal representative may "recover such damages as the jury may assess," makes the role of the jury dominant, the legislature has the power to amend its own statutory language. In enacting this cap, the legislature expressly repealed any conflicting statutory provisions. Section 15 of the Act stated: "All laws or parts of laws which conflict with this Act are repealed." 1987 Ala. Acts 189 (p. 261). The earlier legislation is to be construed

so as to conform to the requirements of later legislation on the same point.

For these reasons, this Trial Court cannot find any constitutionally protected right to an uncapped jury verdict in a wrongful death case.

B Equal Protection

The plaintiff's argument that § 6-5-547 violates constitutional guarantees to equal protection of the laws depends principally on the premise that "the statute adversely affects the constitutional right to a jury trial and access to courts." [Plaintiff's Brief of November 5, 1993, at 13]. Since this Court has not found any such right in the sense of a guarantee against a cap in a wrongful death case, the plaintiff's argument that "intermediate or heightened scrutiny should apply here," *id.*, will not apply, and the various considerations and authorities for that argument will not apply. In other words, the intermediate or heightened scrutiny test, which requires "a *substantial relationship* between the statutorily imposed classification and/or denial of a fundamental right and the objectives of the statutes", [plaintiff's Brief of November 5, 1993, at 12] (emphasis added), will not apply. Rather, the "least scrutinizing test" – the test of "whether the statutes are rationally related to a legitimate legislative purpose", *id.*, will apply.

Both plaintiff and defendants have submitted extensive exhibits on the equal protection issue. These exhibits

are admitted into evidence.[3] Both plaintiff and defendants submitted additional evidentiary material after the final hearing in this case. Plaintiff filed additional materials on November 9, 1993. Defendants submitted their exhibits N and O on November 12, 1993. These supplemental filings are admitted into evidence.

Plaintiff maintains that there was no liability crisis and no need for tort reform. [*See* Plaintiff's Exhibits 30, 31, 32, 35, 36]. Plaintiff maintains that medical malpractice cases comprise only a small percentage of all civil actions filed in Alabama and that one medical malpractice carrier in Alabama is financially sound. [Plaintiff's Exhibits 1-11]. Plaintiff further maintains that in recent years only a small number of cases involved punitive damages awards, and that plaintiffs nationally won less than a third of all medical negligence cases. [Plaintiff's Exhibits 13, 14, 15]. Plaintiff notes that medical malpractice premiums are less than 1% of total healthcare costs in this country. [Plaintiff's Exhibit 17]. Finally, plaintiff cites a study concluding that there are approximately 150,000 deaths per year nationwide due to medical accidents. [Plaintiff's Exhibit 19].

Defendants submitted evidence that there was considerable debate concerning whether or not a crisis existed in the liability insurance industry and that evidence of a crisis was available to the legislature. [*See* Defendants' Exhibits A, B, and C]. Defendants presented evidence that medical professional liability losses

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[3] The parties were ordered to retain their respective exhibits because of the volume of documents.

mushroomed from 817 million dollars in 1975 to almost two billion dollars in 1983, [Defendants' Exhibit J], and that the average medical malpractice jury verdict more than quadrupled from $220,018 in 1975 to $1,017,716 in 1985, [Defendants' Exhibit C]. Defendants noted that the Alabama Department of Insurance had said that the company insuring the majority of Alabama physicians was losing money on its underwriting and was remaining solvent only with the help of investment income in the mid-eighties. [Defendants' Exhibit A]. Defendants submitted further evidence regarding the closing of obstetrics departments and the increase in the number of Alabama counties without infant delivery at their hospitals. [Defendants' Exhibits A, K]. Defendants further maintained that the threat of medical malpractice suits and the indirect costs of malpractice litigation led to loss of productivity, reduced access to care and increased costs associated with defensive medicine. [Plaintiff's Exhibit A-1 at 12]. Finally, defendants submitted evidence that a cap was an appropriate attempt to constrain malpractice costs. [Defendants' Exhibits I, L; Plaintiff's Exhibit B-19].

The Court finds that the evidentiary showings by plaintiff and defendants demonstrate that the legislature possessed conflicting evidence and that the legislature conceivably could have believed the evidence supporting its fact-findings. It is not the function of this Court to second-guess the legislative fact-findings, *Tyson v. Johns-Manville Sales Corp.*, 399 So. 2d 263, 271 (Ala. 1981), and the statute passes the test of *Reed v. Brunson*, 527 So. 2d 102, 118-19 (Ala. 1988), that the statute be rationally related to a legitimate legislative purpose.

For these reasons this Trial Court finds that § 6-5-547 does not violate the constitutional guarantee to equal protection of the laws.

C. Amount of the Cap

The plaintiff suggests that the § 6-5-547 cap, if sustained, should limit only what each defendant must pay – that the cap should not limit the entire judgment because, if it does, the existence of multiple defendants will dilute the punishment borne by any one of them for a given tort. This argument would apply better to a case involving multiple tort-feasors, each of whom deserved the full brunt of the punishment, than to the instant case, which involves only one defendant tort-feasor and another defendant liable only through the doctrine of *respondeat superior.* In this particular case the Court is constrained to apply the cap as written.

Defendants submitted the affidavit of Frank D. Brown, CPA, on December 9, 1993. This filing is admitted into evidence.

Based upon the calculations of Mobile certified public accountant Frank D. Brown, the cap applicable in this case is $1,276,873, and the Court so finds.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. Defendants' Motion for JNOV, etc. is DENIED.

2. Defendants' Motion in Limine is DENIED and Defendants' Objection to Plaintiff's Exhibits is OVERRULED.

3. Plaintiff's Motion to Declare *Alabama Code* § 6-5-547 Unconstitutional is DENIED.

4. Defendant's Motion to Apply § 6-5-547 of the *Alabama Code* is GRANTED.

5. The judgment dated April 30, 1993 entered in favor of plaintff [sic], Woodrow Smith, and against defendants, William J. Schulte, M.D. and Pulmonary Associates of Mobile, P.A., is ALTERED, AMENDED, and CORRECTED, *nunc pro tunc*, so that it reads:

Judgment be and is hereby entered in favor of plaintiff, Woodrow Smith, and against defendants, William J. Schulte, M.D. and Pulmonary Associates of Mobile, P.A., in the amount of $1,276,873, costs taxed to defendants.

DONE this 13th day of December, 1993.

/s/ Douglas Johnstone
Douglas Johnstone
Judge, Circuit Court
of Mobile County

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 1995-96

1930362 and 1930459

Woodrow Smith, as administrator of the estate of Annie Jo Smith, deceased

v.

William J. Schulte, M.D., et al.

William J. Schulte, M.D., and Pulmonary Associates of Mobile, P.A.

v.

Woodrow Smith, as administrator of the estate of Annie Jo Smith, deceased

Appeals from Mobile Circuit Court (CV-90-001334)

On Application For Rehearing

PER CURIAM.

APPLICATION OVERRULED.

Almon, Shores, Kennedy, Ingram, Cook, and Butts, JJ., concur.

Hooper, C. J., and Maddox and Houston, JJ., dissent.

1930362 and 1930459 *Woodrow Smith v. William Schulte, et al.* and *William Schulte, et al. v. Woodrow Smith*

HOOPER, CHIEF JUSTICE (dissenting from the order overruling the application for rehearing).

I. THE NECESSITY FOR A REHEARING

I think the Court should rehear this case because the plurality's equal protection analysis gives no clear guidance as to when a right of equal protection has been infringed upon by the Legislature. The standard is left so uncertain that virtually no law passed by the Alabama Legislature could survive an equal protection challenge. In addition, I am totally at odds with the plurality's concept of the existence of an equal protection right under the Alabama Constitution. Mr. Smith participated in a full trial of his case, as was his right under § 11 of the Alabama Constitution, and that right was not infringed upon by the damages cap. The medical malpractice damages cap does not violate the Alabama Constitution. On the contrary, any attempt by the Judiciary to strike down a law of the Legislature without first determining that – *beyond a reasonable doubt* – it violates the fundamental law of the State of Alabama is a trespass by the Judiciary upon the power of the Legislature in violation of the

separation of powers declared in the Alabama Constitution, Article III, §§ 42 and 43.

II. SEPARATION OF POWERS

The central question in this case is whether, beyond a reasonable doubt, a statute limiting punitive damages awards in wrongful death actions based on medical malpractice violates the fundamental law of the State of Alabama. This dissent addresses that question.

The preamble to the Constitution of Alabama of 1901 and §§ 42 and 43 state the standard that this Supreme Court must obey as part of the judicial branch of the government of Alabama:

> PREAMBLE:
>
> "We, the people of the State of Alabama, in order to establish justice, insure domestic tranquillity, and secure the blessings of liberty to ourselves and our posterity, invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution and form of government for the State of Alabama:"

> "§ 42. Legislative, executive and judicial departments established.
>
> "The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."

"§ 43. Separation of powers.

"In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men."

The people of Alabama established the Constitution as the governing authority of the State. It governs all three branches – the legislative, the executive, and the judicial. The legislative branch consists of the Legislature, representatives duly elected by the people of Alabama to pass the laws of this State. This Court long ago wrote:

> "Speaking broadly, the Legislature of Alabama possesses all the legislative power which, under the federal Constitution, resides in the state, except where that power has expressly or impliedly been taken from it by the Constitution of the state."

State ex rel. Wilkinson v. Lane, 181 Ala. 646, 62 So. 31 (1913). Throughout the years it has continued to hold that " 'So long as no constitutional limitations are exceeded, the Legislature is of supreme authority, and the courts, as well as all others, must obey.' " *Champion v. McLean*, 266 Ala. 103 at 118, 95 So.2d 82 (1957), quoting *State v. Birmingham So. Ry.*, 182 Ala. 475, 479, 62 So. 77, 79 (1913). "The only power of [the Alabama Supreme] [C]ourt is to

declare the law as enacted by the [legislature]." *Champion v. McLean*, 266 Ala. at 117-18, 95 So.2d at 97.

Only when the Legislature enacts a law that, beyond a reasonable doubt, violates the Alabama Constitution may the Judiciary strike it down. The very foundations of Alabama jurisprudence hold that no judgment of this Supreme Court can reverse or interfere with the Legislature so long as the Legislature acts within its constitutional limits. *Ex Parte Screws*, 49 Ala. 57 at 65 (1873). It is not the responsibility of the Judiciary to substitute its judgment for that of the Legislature regarding a particular law. Instead, "the legislature's power is plenary [and] [t]he Courts cannot look to the wisdom or folly, the advantages or disadvantages, of the [legislative action]." *Opinion of the Justices No. 265*, 381 So.2d 183 at 185 (1980). This Court has also stated:

> "The judicial branch of government was not intended to be and will not presume to act as a super agency to control, revise, modify or set at naught the lawful acts of administrative agencies. It is under restraint (§ 43, Constitution 1901) [sic] from imposing its methods or substituting its judgment for that of the [other] branches of the government."

Finch v. State, 271 Ala. 499, 504, 124 So.2d 825, 830 (1960). Judicial overreaching defeats the requirement that we have "a government of laws and not of men." Ala. Const. 1901, § 43. Laws that do not violate the fundamental law are those of the people, whose Constitution requires obedience by all three branches.

If the Judiciary has no standard by which to determine whether to strike down the laws of the Legislature,

then no law is safe. Indeed, "it is not the function of the court to usurp the role of the legislature and to amend statutes under the guise of construction." *Honeycutt v. Employees' Retirement System of Alabama*, 431 So.2d 961, 964 (Ala. 1983). See also *State v. Praetorians*, 226 Ala. 259, 261, 146 So. 411, 413 (1933). When the Judiciary does so, it violates § 43 and "exercise[s] . . . the legislative . . . powers." Ala. Const. 1901, § 43.

In 1983 this court held: "[I]t is not a function of this court to determine the wisdom of specific legislation unless a law has no rational relationship to its intended purpose." *Beddingfield v. Central Bank of Alabama, N.A.*, 440 So.2d 1051, 1052 (Ala. 1983). Because it is not this Court's function to usurp the role of the Legislature and to correct legislation under the guise of construction, see *Town of Loxley v. Rosinton Water, Sewer & Fire Protection Authority, Inc.*, 376 So.2d 705 (Ala. 1979); *Employees' Retirement System of Alabama v. Head*, 369 So.2d 1227 (Ala. 1979); *Childers v. Couey*, 348 So.2d 1349 (Ala. 1977), the Judiciary has always applied a very high standard in determining whether a law violates the fundamental law – that standard is whether the violation has been shown beyond a reasonable doubt.

We, as members of the final court of appeal in the State of Alabama, the highest human authority in the judiciary branch, have a sacred duty to maintain this balance by our own self-restraint and self-government. We have consistently held that "Courts, *above all others*, are charged with a very sacred duty not to encroach upon the domain of other departments of government under our constitutional system of government." *Hendrix v. Creel*, 292 Ala. 541, 545, 297 So.2d 364, 367 (1974)

(emphasis added); *Finch v. State*, 271 Ala. 499, 124 So.2d 825 (1960). Indeed, this Court has written:

> " 'No branch of the government is so responsible for the autonomy of the several governmental units and branches as the judiciary. Accordingly, we have held that courts cannot and will not interfere with the discretion vested in other units or branches of government.' "

Piggly Wiggly No. 208, Inc. v. Dutton, 601 So.2d 907 (Ala. 1992), quoting *Finch v. State*, 271 Ala. 499, 503, 124 So.2d 825, 829 (1960). Aside from the numerous prior holdings and other statements of this court, the basic writings supporting our American system of jurisprudence also warn against the dangers of mixing powers. In *The Spirit of Laws* Montesquieu wrote:

> "But though the tribunals ought not to be fixed, the judgments ought; and to such a degree as to be ever conformable to the letter of the law. Were they to be the private opinion of the judge, people would then live in society, without exactly knowing the nature of their obligations. . . . "

> "Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression."

Charles de Secondat Montesquieu, *The Spirit of Laws* (1900).

Chancellor Waites said:

> "The interference of the judiciary with legislative Acts, if frequent or on dubious grounds, might occasion so great a jealousy of this power and so general a prejudice against it as to lead to measures ending in the total overthrow of the independence of the judges. . . . The validity of the law ought not then to be questioned unless it is so obviously repugnant to the constitution that when pointed out by the judges, all men of sense and reflection in the community may perceive the repugnancy. By such a cautious exercise of this judicial check, no jealousy of it will be excited, the public confidence in it will be promoted, and its salutary effects be justly and fully appreciated."

James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law,"* 7 Harv. L. Rev. 129 (1893).

And in The Federalist No. 78 Alexander Hamilton said:

> "The court must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body."

(Emphasis original.)

No human or human institution is infallible, whether it be the Legislature, the Governor, a judge, or a jury. All these human institutions exist to provide accountability to the others. This Court has said:

> "The Legislative body may make mistakes. They may do wrong. . . . They are but men, and humanity is never, in a legislative sense, *infallible*. But this court can only interfere to control their mistakes, should such mistakes occur, when they involve a disregard of some constitutional restraint, or limitation of their powers, in the enactment of a law. Beyond this, courts *cannot* go."

Ex parte Screws, 49 Ala. 57, 65 (1873) (emphasis added). The phrase "checks and balances" has left an indelible mark upon our national and historical consciousness. Our form of government has sought institutional means to limit the dangers of human fallibility.

Historically, our culture has recognized the fallibility of human beings and the institutions they create and operate. The fact that our system of government is based on multiple institutions with multiple levels of authority prevents any one of those institutions from exceeding its own authority. Because the Judiciary acts as the final interpreter of the acts of the other two branches, it is even more critical for it to exercise self-restraint. *Hendrix v. Creel*, supra, 292 Ala. at 545, 279 So. 2d at 367; *Finch v. State*, supra; *Piggly Wiggly No. 208, Inc. v. Dutton*, 601 So.2d 907 (Ala. 1992).

The jury trial, while the best legal system for judging other human beings, is not infallible. That is why there are myriad restraints placed upon a jury by the Legislature and the courts. There is certain evidence the jury may not even hear during (or before) a trial. There are certain jurors (those with bias) who may not serve on a jury. Sometimes, jurors must be sequestered and their

right to travel restricted. All these restrictions upon a jury protect the parties to a trial from the fallible nature of the human beings sitting on the jury. Sometimes the source of the restrictions is in the Legislature (e.g., the Legislature's laws declaring that a jury in a capital murder case can only recommend a sentence to the trial judge; the judge may disregard its recommendation) and sometimes from within the judicial system itself (e.g., the rules governing the admissibility of evidence). In the criminal law context, the Legislature has removed the authority of a jury to impose a sentence. Only judges can sentence criminal defendants. However, even the judge may not go beyond the "cap" placed on the sentence range for a particular crime by the Legislature (e.g., the judge may not sentence a petty thief, who has no prior convictions, to life imprisonment). These restrictions upon the jury do not take away the constitutional rights of citizens; they preserve those rights. They protect the citizenry from the potential for error or excess a fallible jury always has.

III. EQUAL PROTECTION

I agree with Justice Houston's analysis of §§ 1, 6, and 22 of the Alabama Constitution of 1901 in his dissent to the original per curiam opinion in this case. There exists no right to equal protection under the Alabama Constitution. *Opinion of the Justices No. 102*, 252 Ala. 527, 530, 41 So. 2d 775, 777 (1949). Anyone pursuing an equal protection claim must do so under the Fourteenth Amendment to the United States Constitution.

Regardless of whether this court reaffirms its original decision in this case, it should grant a rehearing in order

to provide a clear legal road map for state equal protection analysis. (While I do not agree that there is a state equal protection guarantee, if the plurality insists on finding one where none exists, then the Court should at least provide future litigants with a coherent legal analysis.) The per curiam opinion in this case makes six statements that might be construed as different equal protection tests to be applied in regard to statutes that limit punitive damages awards.

The first statement is: "We now hold that § 6-5-547 represents a similar form of 'class legislation' that is unreasonable, and, therefore, violates the equal protection guarantee of the Constitution of Alabama." ___ So. 2d at ___. This language appears to set out a rational basis test for equal protection.

The second statement is taken from *Moore v. Mobile Infirmary Association*, 592 So. 2d 156, 166 (Ala. 1991):

> " '[W]hether the classifications created under [the challenged statute] represent a reasonable exercise of legislative power depends on whether they are reasonably related to the stated objective, *and* on whether the benefit sought to be bestowed upon society outweighs the detriment to private rights occasioned by the statute.' "

___ So. 2d at ___ (emphasis added). This language seems to set up two prongs joined by an "and." The first prong resembles a rational basis test, and the second prong appears to be a balancing test between the benefit to "society" and the detriment to "private rights." Taken as a whole, the two prongs appear to set up a heightened

form of scrutiny above mere rational basis scrutiny, possibly intermediate scrutiny.

The third statement is also taken from *Moore*. A court reviewing legislation is to ask " 'whether the connection between the benefit sought to be conferred on society and the means employed to accomplish it, when weighed against the inequalities created by the statute's classifications, is so attenuated and remote as to constitute an unreasonable exercise of police power.' " ___ So. 2d at ___ (quoting *Moore*, 592 So. 2d at 167). It is unclear whether this language is a balancing test, a rational basis analysis, or part of the analysis of one of the earlier stated tests.

The fourth statement also relates to *Moore*: "[T]he connection between the benefit sought from § 6-5-544(b) and the means used to obtain it was too 'indirect and speculative' to support the classifications created." ___ So. 2d at ___ (quoting *Moore*, 592 So. 2d at 170). Again, this language appears to be part of the analysis of an earlier stated test, but it remains unclear where the language might fit into the test, or even what that test might be.

The fifth statement of analysis appears to be original in this case: "Nothing but the strongest possible connection between the benefit sought and the means used to obtain it could justify such an odious burden on the fundamental liberty interest discussed above. . . . " ___ So. 2d at ___. This language seems to describe an unprecedented step above strict scrutiny analysis, which at the federal level is reserved for potential violations of fundamental rights and equal protection problems with racial and ethnic classifications.

The sixth statement of analysis is much like the fifth. It says that "[t]his case involves neither *the circumstances* nor *the necessary connection*" and, therefore, "that § 6-5-547 violates the equal protection guarantee of the Constitution of Alabama." ___ So. 2d at ___ (emphasis added). Again, It [sic] is unclear whether this statement is a test in itself or is part of the analysis of an earlier-mentioned test. Regardless, a future party may be left wondering which *circumstances* or *connections* might satisfy the test.

These six statements of analysis will likely leave future parties wondering what our state law is with regard to equal protection analysis. If people cannot clearly understand the law, then they are likely to transgress it. People involved in future cases may wonder whether statutes limiting punitive damages in wrongful death actions are subject to rational basis analysis, intermediate scrutiny, strict scrutiny, or some other form of analysis. They may also wonder whether statutes limiting punitive damages awards in wrongful death actions are subject to a level of scrutiny different from that to which statutes limiting punitive damages awards in other actions are subject. It seems likely that this lack of clarity in Alabama equal protection analysis comes from the fact that the "Alabama Equal Protection Clause" does not exist.

Even if there were an equal protection right under the Alabama Constitution, no logical argument could support the contention that Ala. Code 1975, § 6-5-547, denies equal protection. Every citizen who seeks medical services (which is practically every citizen of the state) is

treated equally by the statute. There is no class set aside for special treatment.

In addition, no fundamental right is at stake. In the case of Mr. Smith, the statute reduced the punitive damages awarded by the jury from $4,500,000 to $1,276,873. Does this reduction constitute state action devaluing the life of an Alabama citizen?!

A cap on punitive damages clearly affects an economic interest. The interest it affects is not a fundamental right like the right to marry, a denial of which would receive strict scrutiny. Yet, even marriage has regulations imposed upon it by state law, such as those relating to age, consanguinity, and blood tests. Some of these regulations impose positive prohibitions upon the right to marry. Certain laws forbid a person to marry certain people, e.g., one's brothers, sisters, first cousins, and other close relatives. Yet, these regulations clearly do not deny the right to marry; they merely regulate that right and preserve marriage as a unique and sacred institution. The cap on punitive damages also does not deny a fundamental right.

This Court should grant a rehearing in order to clarify the *analysis*. No matter what an individual Justice's opinion regarding this case may be, the Court should set out a clearer legal road map for state equal protection analysis. We must give the people of Alabama a reasonable capacity to understand and to comply with the standard.

IV. RIGHT TO TRIAL BY JURY

Mr. Smith was not denied his right to trial by jury by the medical malpractice damages cap. He had the trial by jury guaranteed him under Alabama Constitution § 11. The jury decided in his favor. The Legislature had passed a law that limited the amount of punitive damages a jury can award in a medical malpractice case. The Legislature imposes restrictions on the types of criminal sentences, amounts of awards, even the existence of a cause of action itself. In *Gilbreath v. Wallace*, 292 Ala. 267, 269, 292 So. 2d 651, 652 (1974), this Court ruled that "Having conferred such a right [the right to a trial by jury in a case where that right had not previously existed], the legislature has the power to abolish that right. It therefore follows that the legislature might also constitutionally limit or abridge that right." Mr. Smith experienced no denial of the right to trial by jury due to § 6-5-547.

The argument about regulating marriage as an example of the power of the Legislature to regulate a fundamental right applies just as strongly to the question of the right to trial by jury. The jury system is not only constitutional, but it is the best system we know for human beings to resolve their disputes. The obvious difficulty is trying to reach a just verdict for the individual and also to achieve the state's interest in not destroying defendants. The danger in destroying defendant corporations and doctors is the loss of jobs and medical care to the people of Alabama, a danger the legislature has an undisputed right to seek to avoid.

Sentencing a criminal defendant provides both a punishment and a deterrence to future bad conduct.

Awarding punitive damages in a civil case also provides both a punishment and a deterrence to future bad conduct. They are in principle the same. In the criminal context, only a sentence of death will destroy a criminal defendant. Never are punitive damages awarded for the purpose of destroying a civil defendant – only for the purpose of punishing the defendant and deterring the defendant and others from future similar bad conduct.

When a trial judge rejects a jury's recommendation against imposing a death sentence, the judge takes away the jury's recommendation. The defendant's right to a jury trial is not thereby taken away also. The Legislature gave the trial judge the right to reject the recommendation of death. In fact, the Legislature has the right to totally abolish the death penalty, however wise or unwise one may feel it would be for the Legislature to do so. In the same way, the Legislature should have the right to place a cap on punitive damages that a jury can award.

The right to a jury trial is maintained in both the criminal case and the civil case when such laws affect the jury's decision. Only the extent of that right is controlled by the Legislature. In the capital case, a judge controls the ultimate sentence, as allowed by the Legislature. In *Ex parte Hays*, 518 So. 2d 768 (Ala. 1986), this Court stated: "Both the old and the new death penalty statutes clearly embody the principle that the judge is the final sentencing authority and may, therefore, override the recommendation by the jury." In a punitive damages case, the Legislature controls. The Legislature should have more control in a civil punitive damages case than in the criminal case, because of the potential for destruction that

punitive damages can have upon the welfare of the entire state.

Common sense tells us that a cap on punitive damages should be available under the law. What that cap should be we are not to say. Only the Legislature speaks to this issue. Why? Because it is the Legislature's right to make decisions and pass laws that affect the condition of this state in the areas of jobs and medical care. The Judiciary cannot pass laws to encourage the growth of jobs and access to medical care. The Judiciary may review legislation only to determine if it is clear beyond a reasonable doubt that the legislation violates the fundamental law.

Many factors go into a decision of the jurors, e.g., the difference in legal talents of the lawyers before the jury, the demeanor of a lawyer or judge, an unintended mannerism of a trial judge, the peculiar experiences of the jurors unrelated to the evidence at trial (e.g., bias against a doctor who had been perceived as having a poor bedside manner), etc. The voir dire process cannot cull all these outside influences and biases. The jury may not hear certain items of evidence, may not read certain outside materials, may not invent a new cause of action, and may not award compensatory damages beyond the actual loss of the plaintiff. For example, the judge may instruct the jurors to disregard a certain statement made by a witness, meaning they are not even to think about that statement in making their decision. These laws and rules of procedure constantly regulate, supervise, and control the actions and decisions, even the thoughts, of jurors. Yet those Justices composing the majority in this case do not consider unconstitutional any of these rules

and laws that control and limit a jury's decision-making power. Why the difference?

V. INCONSISTENT HOLDING

After stating that a reduction of punitive damages by an Act of the Alabama Legislature violates an alleged equal protection guarantee in the Alabama Constitution, those justices making up the majority in this case then turned completely around and, on their own authority, reduced the punitive damages award from $4,500,000 to $2,500,000. I disagree with the reasoning used in the per curiam opinion. That opinion says that an act of the Legislature may not set a limit upon punitive damages awards because such an act would devalue human life and deprive an Alabama citizen of "a fundamental right . . . of liberty." ___ So. 2d ___. Does this Court claim, by that decision, that it can devalue the life of an Alabama citizen or deprive that citizen of a "fundamental right . . . of liberty," but that the Legislature cannot? According to the reasoning of the per curiam opinion, it appears that it can.

While agreeing that the damages need reduction, I do not agree with the reasoning of the per curiam opinion. Remittitur is a valid and constitutional action this Court can take. However, in this case, the damages should be reduced to the amount set by Ala. Code 1975, § 6-5-547, a statute enacted pursuant to the reasoning of the duly elected representatives of the people of Alabama. Section 43 of the Alabama Constitution of 1901 states: "[T]he judicial [branch] shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men." The

Legislature, composed of the duly elected representatives of the citizens of Alabama, passed a law to protect those citizens. I cannot conclude that that law, clearly and beyond a reasonable doubt, violates the fundamental law of this state. On the contrary, I think it clear, beyond a reasonable doubt, that that statute does not violate our fundamental law. This Court should interpret those laws intended to protect Alabama citizens, not abolish them.

On the old Mobile County Courthouse appears this statement: "The laws of our land build on reason and experience, and the chief of all laws is the will of the people." I heartily endorse that principle; therefore, I must respectfully dissent.

Woodrow Smith v. William Schulte
William Schulte v. Woodrow Smith

MADDOX, JUSTICE (dissenting from the order overruling the application for rehearing).

On original deliverance, I joined Justice Houston's dissent, but I did not then spell out the specific reasons for my dissent. However, in a subsequent case, *Ray v. Anesthesia Associates of Mobile, P.C.*, [Ms. 1931023, Sept. 22, 1995] ___ So.2d ___ (Ala. 1995), I discussed in some detail the reason why I believe the right to trial by jury guaranteed by § 11 of our State Constitution refers only to the right to have a jury of 12 persons who must reach a unanimous verdict. In *Ray v. Anesthesia Associates of Mobile, P.C.*, I said:

> "In *Smith v. Schulte*, this Court cited *Gilbreath v. Wallace*, 292 Ala. 267, 292 So.2d 651

(1974), to support its holding that the Legislature could not impose a cap on punitive damages in a wrongful death case, on the ground that to do so would violate a plaintiff's right to trial by jury. I participated in the decision in *Gilbreath v. Wallace*, and I recall the debates surrounding the decision in that case. *Gilbreath v. Wallace* was a will contest case, and the issue in that case was whether, at the time of the adoption of the 1901 Constitution, a party was entitled to a trial by jury in a will contest case. That case did not address whether the Legislature had the power to set a cap on punitive damages in a statutorily created wrongful death action, the subject matter of this case. Consequently, the decision in this case and the decision in *Smith v. Schulte* cannot be bottomed upon the principle of law set out in *Gilbreath v. Wallace*.

"In *Gilbreath v. Wallace*, this Court discussed only the basic and fundamental right to trial by jury, or as it is stated in the opinion, the 'substance' of the right to trial by jury, which 'is confined to those classes of cases in which the right existed at common law, or in which it was used at the time of the adoption of the Constitution.' *Gilbreath v. Wallace*, 292 Ala. 267, 270, 292 So. 2d 651, 653 (1974), quoting *Alford v. State ex rel. Attorney General*, 170 Ala. 178, 188-89, 54 So. 213, 215-16 (1910) (Mayfield, J., dissenting).

"Of course, this statement of the rule is merely a restatement of the principle declared in *Thomas v. Bibb*, 44 Ala. 721, 722 (1870): '[T]he right of trial by jury is confined to cases in which it was conferred by the common law, to suits which the common law recognized amongst its old and settled proceedings and

suits, in which *legal rights* were to be ascertained and determined, in contradistinction to those in which *equitable rights alone* were recognized, and equitable remedies were administered, or in which was a mixture of law and equity.' (Emphasis added) (citing Story on Const. § 1763; *Tims v. State*, 26 Ala. 165 (1855); cf., *Boring v. Williams*, 17 Ala. 510 (1850)).

"It is plain that *Gilbreath v. Wallace* does not address the issue presented in this case, but addresses only whether the Legislature could reduce the number of jurors from 12 to 6. A reading of the opinion in *Gilbreath v. Wallace* shows that the predominate issue was whether, at common law, a person was entitled to a jury in a will contest case. In fact, Justice Jones, the author of the *Gilbreath v. Wallace* opinion, discussed in some detail whether 'an action to contest the validity of a will [was] a proceeding sui generis, unknown to the common law,' 292 Ala. at 270, 292 So. 2d at 654, as argued by the appellee in that case. He wrote:

> " 'In the common law of England there was no probate court. Bequests and legacies were handled by the ecclesiastical court and devises by the law court. At law, the heir of a testator could never be deprived of his inheritance without the intervention of a jury to try the issue of *devisavit vel non* (literal translation: will or no will – is the paper purporting to divest the heir of his inheritance the true last will of the deceased, legally executed by him while competent and without the interposition of undue influence?). Somewhat later, wills were submitted to the conscience of the

Chancellor. When the question of the validity of a will arose in Chancery, the heir-at-law was entitled to have the issue of *devisavit vel non* 'made up' and sent out of that court to a court of law and submitted to a jury. See *Bennet v. Vade*, 2 Atk. 324, 26 Eng. Reprint 597 (1742), and *Webb v. Cloverden*, 2 Atk. 424, 26 Eng. Reprint 656 (1742). This right was recognized in one of our early decisions, *Kennedy's Heirs and Executors v. Kennedy's Heirs*, 2 Ala. 571, 625 (1841), where it was stated:

> " ' "It may be regarded a settled practice of equity, to direct an issue of law, where a question arises upon the validity of a will, and it would be irregular for the Court to render a decree against the heir until the validity of the devise had been found by a jury."

" 'Prior to 1821 (the year of the legislative enactment conferring the right to contest wills in the probate court), Alabama was governed by a statute, Clay's Digest 598, § 15 (1843), enacted in 1807 through the Mississippi Territorial Government, which permitted the contest of wills in equity. This statute was the forerunner to Tit. 61, §§ 62 and 67, Code of Alabama 1940 (Recomp. 1958). The latter section and the earlier provision authorize a jury trial, but the language is merely *permissive*, i.e., that the court *may* direct an issue to be tried to a jury. Nevertheless, the Court in *Hill v. Barge*, 12 Ala. 687, 692 (1848), construing the earlier act, declared that the right was absolute

> on demand of either party and not committed to the discretion of the Chancellor.
>
> " 'Thus, it can be seen that in Alabama there has always been a right to trial by jury in a will contest. The Texas Supreme Court in *Cockrill v. Cox*, 65 Tex. 669, 674 (1876), when faced with a similar issue, held:
>
> > " ' "The provision in the Constitution of 1876, that the right of trial by jury shall remain inviolate, must be considered as perpetuating the right in the cases, in which, at the date of its adoption, it had been so universally recognized and firmly established, as in the contests arising over the proof of wills." '
>
> "292 Ala. at 270-71, 292 So. 2d at 654. (Emphasis original.)"

___ So.2d at ___ .

In *Ray v. Anesthesia Associates of Mobile, P.C.*, I asked this question: "Why did Justice Jones discuss whether a will contest case was a 'law' case or an 'equity' case?" ___ So.2d at ___. I answered that question by saying that a party's *substantive* right to trial by jury is always determined by whether the party's action is "at law" or "in equity," unless the right to trial by jury has been granted by statute.

Because the Court relies so strongly upon the holding in *Gilbreath v. Wallace*, it is instructive to consider why the Court determined that there was a *substantive* right to trial by jury in that case. The Court in *Gilbreath v. Wallace* said:

> "[I]f the right to a trial by jury in a will contest is a right secured by the Alabama Constitution, then the Legislature may not abridge or limit the *substance* of that right."

292 Ala. at 269, 292 So. 2d at 652.

It is not accidental that the word "substance" was italicized in the original opinion in *Gilbreath v. Wallace*, because that case did not hold, and should not be cited as holding, that a party had a common law right to have a jury fix the amount of punitive damages that could be awarded.

In order to get a better understanding of the right to trial by jury at common law, I have reviewed Sir Matthew Hale's *The History of the Common Law of England* (1739), reprinted in *Classics of British Historical Literature*, at 160-67 (John Clive, ed., 1971), and I set out here pertinent portions of that treatise to show the composition of the common law jury, its role, especially its role to be impartial, and the role of the court in assuring that justice would be done, according to law:

> "Touching Trials by Jury
>
> "Having in the former Chapter somewhat largely treated of the Course of Descents, I shall now with more Brevity consider that other Title of our Law which I before propounded (in order to evidence the Excellency of the Laws of England above those of other Nations,) *viz. The Trial by a Jury of Twelve Men*; which upon all Accounts, as it is settled here in this Kingdom, seems to be the best Trial in the World: I shall therefore give a short Account of the Method and Manner of that Trial, *viz.*

"*First*, The Writ to return a Jury, issues to the Sheriff of the County: And,

"*1st*, He is to be a Person of Worth and Value, that so he may be responsible for any Defaults, either of himself or his Officers. And, *2dly, Is sworn*, faithfully and honestly to execute his Office. This Officer is entrusted to elect and return the Jury, which he is obliged to do in this Manner. 1. Without the Nomination of either Party. 2. They are to be such Persons as for Estate and Quality are fit to serve upon that Employment. 3. They are to be of the Neighborhood of the Fact to be inquired, or at least of the County or Bailywick. And, 4. Anciently Four, and now Two of them at least are to be of the Hundred. *But Note, This is now in great Measure altered by Statute.*

"*Secondly*, Touching the Number and Qualifications of the Jury.

"*1st*, As to their Number, though only Twelve are sworn, yet Twenty-four are to be returned to supply the Defects or Want of Appearance of those that are challenged off, or make Default. *2dly*, Their Qualifications are many, and are generally set down in the Writ that summons them, *viz.* 1. They are to be *Probi & legales Homines.* 2. Of sufficient Freeholds, according to several Provisions of Acts of Parliament. 3. Not Convict of any notorious Crime that may render them unfit or that Employment. 4. They are not to be of the Kindred or Alliance of any of the Parties. And, 5. Not to be such as are prepossed [sic] or prejudiced before they hear their Evidence.

". . . .

"*Sixthly,* When the Jurors appear, and are called, each Party has Liberty to take this Challenge to the Array itself, if unduly or partially made by the Sheriff; or if the Sheriff be of Kin to either Party, or to the Polls, either for Insufficiency of Freehold, or Kindred or Alliance to the other Party, or such other Challenges, either Principal, or to the Favour, as renders the Juror unfit and incompetent to try the Cause, and the Challenge being confess'd or found true by some of the rest of the Jury, that particular incompetent Person is withdrawn.

"*Seventhly,* Then Twelve, and no less, of such as are indifferent and are return'd upon the principal Pannel, or the Tales, are sworn to try the same according to their Evidence.

"*Eighthly,* Being thus sworn, the Evidence on either Part is given in upon the Oath of Witnesses, or other Evidence by Law allowed, (as Records and ancient Deeds, but later Deeds and Copies of Records must attested by the Oaths of Witnesses) and other Evidence in the open Court, and in the Presence of the Parties, their Attornies, Council and all By-standers, and before the Judge and Jury, where each Party has Liberty of excepting, either to the Competency of the Evidence, or the Competency or Credit of the Witnesses, which Exceptions are publickly stated, and by the Judges openly or pubickly allowed or disallowed, wherein if the Judge be partial, his Partiality and Injustice will be evident to all By-standers; and if in his Direction or Decision he mistake the Law, either through Partiality, Ignorance, or Inadvertency, either Party may require him to seal a Bill of Exception, thereby to deduce the Error of the Judge (if

any were) to a due Ratification or Reversal by Writ of Error.

"*Ninthly*, the Excellency of this Open Course of Evidence to the Jury in the Presence of the Judge, Jury, Parties and Council, and even of the adverse Witnesses, appears in these Particulars:

". . . .

"*5thly*, And further, The very Quality, Carriage, Age, Condition, Education, and Place of Commorance of Witnesses, is by this Means plainly and evidently set forth to the Court and the Jury, whereby the Judge and Jurors may have a full Information of them, and the Jurors, as they see Cause, may give the more or less Credit to their Testimony, for the Jurors are not only Judges of the Fact, but many Times of the Truth of Evidence; and if there be just Cause to disbelieve what a Witness swears, they are not bound to give their Verdict according to the Evidence or Testimony of that Witness; and they may sometimes give Credit to one Witness, tho' oppos'd by more than one. And indeed, it is one of the Excellencies of this Trial above the Trial by Witnesses, that altho' the Jury ought to give a great Regard to Witnesses and the Testimony, yet they are not always bound by it, but may either upon reasonable Circumstances, inducing a Blemish upon their Credibility, tho' otherwise in themselves in Strictness of Law they are to be heard, pronounce a Verdict contrary to such Testimonies, the Truth whereof they have just Cause to suspect, and may and do often pronounce their Verdict upon one single Testimony, which Thing the Civil Law admits not of.

"*Tenthly,* Another Excellency of this Trial is this; That the Judge is always present at the Time of the Evidence given in it: Herein he is able in Matters of Law emerging upon the Evidence to direct them; and also, in Matters of Fact, to give them a great Light and Assistance by his weighing the Evidence before them, and observing where the Question and Knot of the Business lies and by shewing them his Opinion even in Matter of Fact, which is a great Advantage and Light to Lay-Men: And thus, as the Jury assists the Judge in determining the Matter of Fact, so the Judge assists the Jury in determining Points of Law, and also very much in investigating and enlightening the Matter of Fact, whereof the Jury are Judges.

"*Eleventhly,* When the Evidence is fully given, the Jurors withdraw to a private Place, and are kept from all Speech with either of the Parties till their Verdict is delivered up, and from receiving any Evidence other than in open Court, where it may be search'd into, discus'd and examin'd. In this Recess of the Jury they are to consider their Evidence, and if any Writings under Seal were given in Evidence, they are to have with them; they are to weigh the Credibility of Witnesses, and the Force and Efficacy of their Testimonies, wherein (as I before said) they are not precisely bound to the Rules of the Civil Law, *viz.* To have two Witnesses to prove every Fact, unless it be in Cases of Treason, nor to reject one Witness because he is single, or always to believe Two Witnesses if the Probability of the Fact does upon other Circumstances reasonably encounter them; for the Trial is not here simply by Witnesses, but by Jury; nay, it may so fall out, that the Jury upon their own

> Knowledge may know a Thing to be false that a Witness swore to be true, or may know a Witness to be incompetent or incredible, tho' nothing be objected against him, and may give their Verdict accordingly.
>
> "*Twelfthly*, When the whole Twelve Men are agreed, then and not till then, is their Verdict to be received; and therefore the Majority of Assentors does not conclude the Minority, as is done in some Countries where Trials by Jury are admitted: But if any one of the Twelve dissent, it is no Verdict, nor ought to be received. It is true, That in ancient Times, as Hen. 2. and Hen. 3.'s Time, yea, and by Fleta in the Beginning of Edw. I.'s Time, if the Jurors dissented, sometimes there was added a Number equal to the greater Party, and they were then to give up their Verdict by Twelve of the old Jurors, and the Jurors so added; but this Method has been long Time antiquated, notwithstanding the Practice in Bracton's Time, lib. 4. cap. 9. and Fleta, lib. 4. cap. 9. for at this Day the entire Number first empanell'd and sworn are to give up an unanimous Verdict, otherwise it is none. And indeed this gives a great Weight, Value and Credit to such a Verdict, wherein Twelve Men must unanimously agree in a Matter of Fact, and none dissent; though it must be agreed, that an ignorant Parcel of Men are sometimes governed by a few that are more knowing, or of greater Interest or Reputation than the rest."

(Emphasis original.)

This statement from this learned treatise shows unequivocally that the *substance* of the right to trial by

jury refers only to the number of jurors (12) and the fact that their verdict must be unanimous.

It is regrettable, therefore, that this Court, not only in this case, but in *Henderson v. Alabama Power Co.*, 627 So.2d 878 (Ala. 1993), and others, could construe § 11 of the Alabama Constitution in such a manner as to give a jury of 12 persons the right to nullify an act of the State Legislature. It is especially regrettable that jury nullification is selectively permitted by this Court in civil cases, excepting those cases in which cities and counties are defendants, wherein a jury of 12 persons can be stripped of its power without constitutional ramifications. Regarding this selective application, I agree completely with what Justice Houston wrote in his dissent from the per curiam opinion in this case, but I now write separately because I am the only member of this Court who participated in *Gilbreath v. Wallace*, which has been cited for a principle of law that is not in that case.

Woodrow Smith v. William Schulte, et al.
William Schulte, et al. v. Woodrow Smith

HOUSTON, JUSTICE (dissenting from the order overruling the application for rehearing).

Only 56 days after this Court released its opinion in this case, it released a decision in *Ex parte Jackson*, [Ms. 1920376, October 13, 1995] ___ So.2d ___ (Ala. 1995). To express my views in this case, I readopt my concurrence in the result in *Jackson*, for it shows the extent of the inconsistencies to which this Court has had to resort in interpreting § 11 of the Constitution of Alabama of 1901, in order to strike down caps that were imposed on punitive damages as part of the 1987 tort reform legislation.

In my opinion, as to civil defendants whose property is taken to an extent in excess of legislatively mandated limits, this inconsistency violates their due process rights and their rights guaranteed under the Equal Protection Clause of the Fourteenth Amendment. In my opinion concurring in the result in *Jackson*, I wrote:

> "In my dissent in *Smith v. Schulte*,. . . . I asked:
>
> " '[W]hat is going to happen in future capital cases in which a jury does not unanimously sentence to death but the trial court does sentence to death (which is permissible under Alabama law, assuming that it is not unconstitutional under the state constitution, see *Harris v. Alabama*, ___ U.S. ___, 115 S.Ct. 1031 (1995))[?]'
>
> "Today, I received my answer. Nothing.
>
> "At the time the Constitution of Alabama of 1901 was ratified, juries in Alabama sentenced to death or life imprisonment in capital cases and fixed the amount of compensatory and punitive damages in civil cases.
>
> "In reviewing death penalty cases, this Court must notice error that is so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceeding. *Ex parte Bankhead*, 585 So.2d 112, 117 (Ala. 1991).
>
> "In this case, a jury did not unanimously recommend the death sentence. In fact, a majority of the jury recommended life imprisonment without parole. At the time of the ratification of the 1901 Constitution, this would not have been a valid sentence. Ala. Code 1897, § 4858.

"In *Gilbreath v. Wallace*, 292 Ala. 267, 269-70, 292 So.2d 651, 653-54 (1974), this Court held: 'Alabama's Constitution effected a "freezing" of the right to jury trial as of 1901" in both 'civil and criminal cases.'

"In *Ex parte Giles*, 632 So.2d 577 (Ala. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 2694 (1994), quoting *Crowe v. State*, 485 So.2d 351, 364 (Ala. Crim. App. 1984), rev'd on other grounds, 485 So.2d 373 (Ala. 1985), a majority of this Court held in effect that ' "Article I, Section 11, confers the right of trial by jury as [it] existed at common law and the time of Alabama's *first* [1819] state constitution" ' (emphasis added in *Giles*) and that 'a historical review' of the right was the 'starting point in any § 11 analysis.' 632 So.2d at 580-81. At common law and at the time of the *first* Alabama Constitution, juries convicted and the court alone sentenced.

"In *Smith v. Schulte*, supra, the majority of this Court reembraced *Gilbreath v. Wallace*, supra, to hold that § 11 prohibited the legislature from capping at $1,000,000 the amount that could be awarded in a medical malpractice wrongful death action, an action that was unknown to the common law and that was not in existence at the time of the first Alabama Constitution, but was in existence at the time of the ratification of the Constitution of 1901. Therefore, in *Smith v. Schulte*, the majority of this Court departed from its *Giles* holding that § 11 'confers the right to trial by jury as [it] existed at common law and the time of Alabama's *first* state constitution' and departed from its historic analysis of the claimed right,

because there was *no* right to recover for wrongful death at common law or at the time of the first Alabama Constitution. This was a right that was solely a creature of the legislature created after the first Constitution, but before the 1901 Constitution.

"If I had voted with the majority in *Smith v. Schulte*, I would have to conclude that it is plain error to affirm Jackson's sentence to death; however, I did not vote with the majority, because, in my view, the majority opinion in *Smith v. Schulte* is plain error.

"The majority of this Court has made Art. I, § 11, of the Alabama Constitution its plaything. It can restrict § 11 so as to permit the legislature, after the ratification of the 1901 Constitution, to impose a $100,000 maximum amount of damages that can be recovered by an individual in a tort action against a governmental entity [Ala. Code 1975, § 11-93-2, enacted in 1977], when there was no such limitation on tort damages before the ratification of the 1901 Constitution (see *Garner v. Covington County*, 624 So.2d 1346 (Ala. 1993)) [by reviewing the minutes of the Alabama Constitutional Convention of 1901]; it can broaden § 11 wide enough to strike down a $250,000 cap on punitive damages [Ala. Code 1975, § 6-11-21 (1987)] (*Henderson v. Alabama Power Co.*, 627 So.2d 878 (Ala. 1993)) [refusing to review the minutes of the Alabama Constitutional Convention of 1901]; it can shrink § 11 small enough to be able to affirm a court's, as opposed to a jury's, sentence to death, even though sentencing to death was a jury's function when the 1901 Constitution was ratified (see *Ex parte Giles*, 632 So.2d 577 (Ala. 1993)); it can

again broaden § 11 wide enough to strike down a $1,000,000 cap on a wrongful death recovery in a medical malpractice action (*Smith v. Schulte*, supra) [Ala. Code 1975, § 6-5-547 (1987)]; and today it shrinks § 11 so small that it can ignore it ('the jury returned an advisory verdict, by a majority vote of seven to five, recommending a sentence of life imprisonment, without parole,' ___ So.2d at ___) and affirm Jackson's death sentence. I dissented in *Henderson v. Alabama Power Co.* and in *Smith v. Schulte*. I concurred in the result in *Ex parte Giles*. I concur in the result in this case, because I believe the legislature had the power to impose caps on punitive damages and to fix the method of punishment for crime (*Henderson v. Alabama Power Co.*, 627 So.2d at 905-08 (Houston, J., dissenting)); *Ex parte Giles*, 632 So.2d at 587 (Houston, J., concurring in the result)). I regret that the abolition of caps on punitive damages was such a felt necessity of the times that the majority of this Court played a sleight-of-hand trick to justify striking these caps, while trying not to have to declare unconstitutional much of Chapter 5 of Title 13A of the Code (Ala. Code 1975, §§ 13A-5-1 through 13A-5-59), 'Punishments and Sentences.'

"I am convinced that *Henderson v. Alabama Power Co.* and *Smith v. Schulte* were wrongly decided. If there is a due process or equal protection violation as a result of this waffling by the majority, it would be the civil defendants whose property was taken in excess of legislatively mandated limits who would have a right to have that violation redressed, not the criminal defendants whose punishment has been legally prescribed by legislation.

"Therefore, I concur in the result. However, if I had voted with the majority of the Court on the right-to-jury-trial issue in *Henderson v. Alabama Power Co.* or in *Smith v. Schulte*, I would have been unable to vote to affirm Jackson's sentence of death."

___ So.2d at ___.

[Rendered December 15, 1995]

IN THE SUPREME COURT OF ALABAMA

WOODROW SMITH, as ADMINISTRATOR OF THE ESTATE OF ANNIE JO SMITH, deceased,	§	**SUPREME COURT NO.: 1930362**
Appellant/Cross-Appellee,	§	
vs.	§	
WILLIAM J. SCHULTE, M.D.; PULMONARY ASSOCIATES OF MOBILE, P.A., et al.,	§	
Appellees/Cross-Appellants.	§	

REQUEST FOR RECUSAL

Appellees/Cross-Appellants, William J. Schulte, M.D. and Pulmonary Associates of Mobile, P.A. (herein, "Defendants"), respectfully request the recusal of Chief Justice Sonny Hornsby and Justice Janie L. Shores in this case.

As grounds therefor, defendants show unto the Court as follows:

1. This is a medical malpractice wrongful death case in which the jury awarded $4.5 million against Dr. Schulte and his group.

2. The trial court entered judgment against the defendants for $1,276,873, the amount of the statutory cap as adjusted for increases in the Consumer Price Index, pursuant to § 6-5-547 of the *Alabama Code.*

3. Appellant/Cross-Appellee, (herein, "Plaintiff") appealed from this judgment and challenges § 6-5-547 as

unconstitutional under the right to trial by jury and equal protection clauses of the Alabama Constitution of 1901.

4. Defendants request that Chief Justice Hornsby recuse himself, as he has done in each prior case involving tort reform legislation, because of his role in the legislation.

5. Defendants request the recusal of Justice Shores because of prior comments and conclusions contained in "A Suggestion for Limited Tort Reform: Allocation or Punitive Damage Awards to Eliminate Windfalls", 44 *Ala. L. Rev.* 61 (1992).

6. The legislative intent of § 6-5-540 includes in part:

> It is hereby declared by the Legislature of the State of Alabama that a crisis threatens the delivery of medical services to the people of Alabama.

7. In his brief, Plaintiff argued:

> [T]here was and is no empirical evidence that placing a cap on wrongful death damages has any effect whatsoever on (1) health care costs, (2) the plight of those who can least afford health care (3) the number of unnecessary medical procedures, (4) the availability of essential medical services, or (5) the number of physicians providing specialized healthcare in this state. In fact, the empirical evidence, both at the time the Legislature enacted § 6-5-547 and since indicates quite the contrary.

Plaintiff's Brief at 38. In his reply brief, Plaintiff argued:

> In short, the evidence establishes that the Legislature could not have found a rational relationship between cap legislation and the purported "crisis."

Plaintiff's Reply Brief at 8.

8. Plaintiff's post-trial evidentiary showing included the following exhibits:

EXHIBIT 15		" 'Litigation Explosion' – Tempest in a Teapot?" Roxanne Barton Conlin, TRIAL, November 1991
EXHIBIT 21		"Studies Refute the Critics – Litigation Explosion Disputed" The National Law Journal, Monday, July 29, 1991, Page 26.
EXHIBIT 30		"Was There a Liability Crisis?" Henry J. Reske, ABA Journal/January 1989, Volume 75.
EXHIBIT 31		"A Tale of Two Theories – is the Legal System Responsible for the Insurance Crisis?" Peter T. Kotula and Heidi Kristiansen, Journal of Legislation, Volume 14, 179, 1987, Pages 179-190.
EXHIBIT 32	a.	"Tort Reform: An Elimination of Rights" Dwight W. James and Robert L. Habush;
	b.	Liability-Limiting Legislation: an impermissible Intrusion into the Jury's Right to Decide" David J. Wiggins and Robert S. Caldwell;

c. "Insurance Crisis: Fact and Fiction" Thomas J. Vilsack;

EXHIBIT 35 "Medical Malpractice Crisis: Rethinking Issues and Alternatives" Stephen L. Sapp, 55 Defense Counsel Journal, 373, October 1988.

EXHIBIT 36 "Insurance Crisis or Tort Crisis? Exploring Myths and Examining Facts" John M. Stanoch, Hamline Law Review, volume 10, Pages 443-505.

(listing taken from Plaintiff's Index)

9. Defendants' brief includes the following:

> There was and has been considerable debate concerning whether or not a crisis existed in the liability insurance industry. Opponents of tort reform argued repeatedly that no such crisis existed, *see, e.g.*, Defendants' Ex. A, pp. 1, 8, 11, and many of Plaintiff's articles are directed to the issue. Such rhetoric, however, did not withstand a more reasoned analysis, *e.g.*, Defendants' Ex. B; *see also* Defendants' Ex. C, pp. 27-28, and it is clear that the House Judiciary Subcommittee heard testimony that one key underlying reason for the crisis was expanding and increasing tort liability. Defendants' Ex. D, p. 188; *see also* Defendants' Ex. E, F, G, H, and I.
>
> The statistical information on medical claims also confirmed a need for action. . . .
>
> There was also ample evidence available that the threat of malpractice litigation increased costs and decreased the availability of health care. . . .

Defendant's Brief at 24-26.

10. In her article, Justice Shores has stated the following conclusions:

> In the 1980s the debate [regarding punitive damages] continued, but it changed from a legal and academic one to "a highly politicized public policy debate about the alleged negative effects of punitive damages on American society and the economy." Well-financed groups whose interests would be served by the reduction or elimination of punitive awards have adopted a political agenda by which they seek to convince policymakers that a crisis exists that requires immediate action to reform the civil justice system. These groups contend that juries are awarding punitive damages in excessive amounts in increasing numbers of cases. The political agenda of these groups has invaded much of the academic debate concerning punitive damages. What was once a rational discourse has become "a matter of public relations, propaganda, and the mobilization of prejudice and fear."

Id. at 70-71 (footnotes omitted).

> During the 1980s, organizations aimed at promoting this political agenda were established in locations throughout the United States. It has been suggested that these organizations have sought to influence the academic literature in this area "through their support of research institutions such as the Rand Corporation's Institute for Civil Justice and the Manhattan Institute for Policy Research."

Id. at 71 (footnotes omitted).

> The comments of two scholars in the field indicate that the efforts to influence the academics may have had some success. The appeal to fear, emotion, and anxiety, while avoiding reason and rational discourse, is known in the world of marketing as "slice-of-death" marketing. According to some observers, the groups seeking fundamental changes in the civil justice system are those that will benefit most from the changes, those potentially liable for punitive damages in the future. Naturally, they favor the reduction or elimination of punitive damages. To achieve these changes, they seek to create a belief in a "set of problems demanding those solutions. To that end, they argue the existence of a crisis which does not exist and contend that it is caused by the frequency and size of punitive damage awards.

Id. at 71-72 (footnotes omitted).

> Thus, it seems that the assault on the civil justice system in general and on punitive damage awards in particular continued unabated with the support of the Bush administration. Yet, now as then, no convincing evidence has been supplied for the proposition that the civil justice system constitutes a competitive disadvantage for American business.

Id. at 73.

> These assumptions are based upon little empirical evidence and the questionable interpretation of what scarce data exists, yet they have fueled the tort reform movement which has brought both legislative and judicial challenges to the doctrine of punitive damages.

Id. at 74 (footnote omitted).

> An examination of the existing data on punitive damage awards, scant as it is, will show that the claims of crisis are greatly exaggerated.

Id. at 76.

> Both sides of the debate have drawn opposite conclusions from the same study, indicating that its scientific value is questionable. Thus, the date is of dubious value in determining whether a nationwide crisis exists. A case study cannot be used to assess the general frequency of a phenomenon, nor can it serve as a legitimate basis for statistical generalization. Nevertheless, those who seek reform of the rules regulating punitive damages continue to cite the ICJ data in support of their position, some even claiming that the data "comprise '[a] comprehensive analysis of jury verdicts in the United States.' " The data has, in fact, been shown to provide little, if any, reliable evidence about what juries are awarding as punitive damages.

Id. at 79 (footnotes omitted).

> The analyses by the American Bar Foundation and by the Roscoe Pound Foundation[1] refute claims of a crisis in the system and specifically show that claims of a crisis in products liability and medical malpractice litigation are unfounded. The statistics produced by these studies fail to support any claim that a general

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[1] While criticizing the involvement of business and medical organizations in the debate, Justice Shores accepts the conclusions of The Roscoe Pound Foundation, an organization affiliated with the Association of Trial Lawyers of America. *Id.* at 82, n. 130.

> crisis exists in the civil justice system. The data also refutes claims that punitive damage awards are generally increasing in both frequency and size.

Id. at 83 (footnote omitted).

> Although there is no reliable data showing that a crisis exists and no reliable data showing that radical changes in the civil justice system are called for, and despite the fact that all the reliable data indicates just the contrary, the proponents of change in the system have been successful in creating a political impetus for tort reform which has brought about the passage of state legislation purporting to solve a problem that does not exist. The tort reform legislation, if it survives constitutional challenge, could defeat the purpose of punitive damage awards.

Id. at 84.

11. Cannon [sic] 4 of the *Canons of Judicial Ethics* states in part as follows:

> A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:
>
> **A.** He may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

The Commentary to Canon 4 states in part as follows:

> As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law,

> the legal system, and the administration of justice, including revisions of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that his time permits, he is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

The caveat, obviously, is that language in the Canon – "if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him."

12. As is noted by the Alabama Supreme Court in *Henderson v. G&G Corp.*, 582 So. 2d 529 (Ala. 1991),

> Recusal is required where facts are shown that make it reasonable for a party or for opposing counsel to question the impartiality of the judge.
>
> . . . The test for recusal is whether a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would conclude that there is a reasonable basis for questioning the judge's impartiality.

Id. at 530 (citations omitted).

13. The appearance of impartiality is also mandated by Due Process. As noted by the United States Supreme Court:

> The Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.' "

Aetna Life Insurance Co. v. Lavoie, 475 U. S. 813, 825, 89 L. Ed. 2d 823, 835, 106 S. Ct. 1580, ___ (1986) (citations omitted).

14. Comments by judges have been found to require recusal. The Third Circuit Court of Appeals, reiterating that the "right to trial by an impartial judge 'is a basic requirement of Due Process,' " *Haines v. Liggett Group Inc.*, 975 F. 2d 81, 98 (3rd. Cir. 1992), ordered the recusal of a district judge because of his statements in an opinion concerning a discovery matter. The trial court had stated:

> In the light of the current controversy surrounding breast implants, one wonders when all industries will recognize their obligation to voluntarily disclose risks from the use of their products. All too often in the choice between the physical health of consumers and the financial well-being of business, concealment is chosen over disclosure, sales over safety, and money over morality. Who are these persons who knowing and secretly decide to put the buying public at risk solely for the purpose of making profits and who believe that illness and death of consumers is an appropriate cost of their own prosperity!
>
> As the following facts disclose, despite some rising pretenders, the tobacco industry may be the king of concealment and disinformation.

Id. at 97. Although the Circuit Court of Appeals noted the trial judge's "magnificent abilities and outstanding jurisprudential and judicial temperament," the Court emphasized that "the polestar is impartiality and *the appearance of impartiality.*" *Id.* (emphasis in original).

15. In addressing public statements made during a campaign, the Supreme Court of Florida found recusal necessary in *LaRussa v. Himes*, 144 Fla. 145, 197 So. 762 (1940). The Court stated:

> Fear that he will not have a fair trial may in some cases be a mental attitude but if the conduct of the judge has been such as to create it, the law requires that he recuse himself. It may ultimately be as devoid of reality as the cenotaph is to the hero it commemorates but if conclusively shown that the seed of fear was planted and the facts related give a reasonable man ground for belief that the judge is prejudiced, that is sufficient. . . .
>
> This situation is typical of how restricted the candidate for judicial preferment is limited as to topics he may discuss on the hustings. The candidate for legislative or executive office is expected to announce his position on policies and issues and to stoutly advocate them but when a candidate for the judiciary does this, he disqualifies himself to sit in any cause affecting the issue he advocates. His oath of office limits his declarations from the stump. The moment he allies himself on either side of issues or individuals, he endangers his position as a judge and apparently destroys his neutrality. The man in the moon and the weather man are about all the people he can with impunity talk about without attitudinizing himself.

144 Fla. at 147-48, 197 So. at 763.

16. Exposure to factual information outside the courtroom led to recusal in *W. R. Grace & Company v. Kelly*, 977 F. 2d 764 (3rd. Cir. 1992). Because the trial judge

had attended a conference on asbestos sponsored in part and indirectly by the plaintiffs' lawyers, the Appellate Court determined that the appearance of impartiality required recusal. Having attended a largely pro-plaintiff seminar regarding factual issues and opinions, recusal was required.

17. Justice Rehnquist addressed the issue of recusal in *Laird v. Tatum*, 409 U.S. 824, 34 L. Ed. 2d 50, 93 S. Ct. 7 (1972). Although Justice Rehnquist concluded that his prior public statements regarding First Amendment rights during the time he was serving as Assistant Attorney General did not warrant recusal, he did consider it a "fairly debatable" question. Justice Rehnquist noted that his prior testimony had been representing the views of the government, and he further noted the problem of a judicial nominee announcing in advance, "without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge."

18. Justice Shores obviously has conducted independent research and has reviewed extensive factual research, and Justice Shores publicly has drawn factual conclusions on issues pertinent to Plaintiff's constitutional challenge. The article is not simply commentary on the law, but reaches into the area of credibility and fact. Justice Shores' article cites to some of the same sources referred to by Plaintiff in his brief, and the article also challenges the impartiality and accuracy of commentators cited by Defendants.

19. Although it would have been difficult to foresee that this particular issue would come before the Court as

it has done, Plaintiff's evidentiary showing and equal protection argument have resulted in a responsibility on the part of defense counsel to call the matter to the Court's attention.

Due process, impartiality, and the appearance of impartiality require that Chief Justice Hornsby and Justice Shores recuse themselves in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 13th day of June, 1994, served a copy of the foregoing pleading on:

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[*Southern Life & Health Ins. Co. v. Turner*, No. 88-1289, Slip Op. (Ala. Sept. 11, 1991) (Maddox, J., dissenting (from denial of stay of judgment))]

Southern Life and Health Ins. Co. v. Lucy R. Turner

MADDOX, JUSTICE (dissenting).

On original deliverance, I concurred in the result reached in the opinion, but I noted that I had reservations about doing so, because I could not be absolutely certain what the Supreme Court of the United States meant when it remanded this case to this Court for reconsideration in view of *Pacific Mutual Ins. Co. v. Haslip*, ___ U.S. ___, 111 S.Ct. 1032 (1991).

Southern Life and Health Insurance Company and Richard Perry have asked the Supreme Court of the United States to review this Court's decision and have now asked us to stay our judgment in this case pending a decision by that Court. I would grant the stay. I am not completely convinced that this Court performed the review that it was mandated to perform.

The Supreme Court of the United States decided *Haslip* in a manner different from what I had predicted in my opinion concurring in part and dissenting in part in *Pacific Mutual Ins. Co. v. Haslip*, 553 So.2d 537, 544 (Ala. 1989). Although a majority of the Supreme Court of the United States in *Haslip* held that the *Hammond*[1] test "ensures meaningful and adequate review by the trial court" and that "the Alabama Supreme Court provides an additional check on the jury's or the trial court's discretion," 111 U.S. at ___, a fair reading of *Haslip*, especially

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[1] *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986).

the special concurrence of Mr. Justice Anthony Kennedy, convinces me that the Supreme Court of the United States did not in *Haslip* give *carte blanche* approval to the State of Alabama regarding every punitive damages award. The remand of this case to this Court for further consideration suggests that we should have applied *Haslip*, not *Hammond*. The very fact that this case was remanded shows that on remand this Court should have done more than reaffirm what it had already done.

In *Haslip*, the Supreme Court of the United States did not "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case," 111 S.Ct. at 1043, but the Court noted, "We are aware that the punitive damages award in this case is more than 4 times the amount of the compensatory damages, is more than 200 times the out-of-pocket expenses of respondent Haslip, . . . and, of course, is much in excess of the fine that could be imposed for insurance fraud under [several Alabama Code sections]," 111 S.Ct. at 1046. That statement and other statements in *Haslip* indicate to me that the Supreme Court has not completely relinquished the regulation of punitive damages awards to the states, and that where the punitive damages award is several times the compensable loss suffered, that fact is significant. The *Hammond* and *Green Oil Co.*[2] procedure seems not to be working.

It is frequently said that persons should rely more on what a person *does* than upon what he *says*. What this

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[2] *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989).

Court has *done*, especially since *Haslip* was released, shows that the procedure found in *Haslip* to be meaningful and adequate may not be.

There is much commendable language in *Hammond* and *Green Oil Co.*, and, as the Supreme Court of the United States points out in *Haslip*, this Court has reduced some verdicts after applying the guidelines set out in those cases; there are, however, other cases in which verdicts have not been reduced.[3] As I stated in my dissent in *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So.2d 414 (Ala. 1991), in which this Court, examining for the first time the effect of *Haslip*, struck down as unconstitutional a state statute that essentially provided for a post-verdict review of punitive damages awards, which *Haslip* had called commendable:

> "The procedure adopted by this Court in *Hammond* and *Green Oil Co.* to review jury awards of punitive damages has been commended as a procedure designed to ensure that a defendant's constitutional right to due process of law will be protected. . . .
>
> ". . . .
>
> "The 'concern for the preservation and protection of a defendant's constitutional right to due process of law' that this Court expressed in *Haslip*, 553 So.2d at 543, seems hollow in view of today's holding. Similarly, the statement by the Supreme Court of the United States in *Haslip* that '[t]he *Hammond* test ensures meaningful

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[3] J. M. Hart, "The Constitutionality of Punitive Damages: *Pacific Mutual Life Insurance Co. v. Haslip*," 21 Cum.L.Rev. 585 (1991).

> and adequate review by the trial court whenever a jury has fixed the punitive damages,' ___ U.S. at ___, 11[1] S.Ct. at 1044, is meaningless if the 'meaningful and adequate review *by the trial court*' (emphasis added [in *Armstrong*]) can be overturned by a stroke of an appellate court's pen, as has happened here. If the verdict of the jury is presumed to be correct, how 'meaningful and adequate' can the review by the trial court and this Court be? It would not be meaningful and adequate unless the reviewing court could conduct an *independent review.*
>
> ". . . .
>
> "From my reading of the decision of the Supreme Court of the United States in *Haslip,* I find it bottomed to a great degree on the *independent review* by the trial court and by this Court. In fact, Haslip's counsel argued in the Supreme Court that Alabama's procedures provided an 'independent review.' This decision, which overturns a judgment by the trial court in exercising that *independent review,* should be proof positive that this Court does not consider that the *Hammond* and *Green Oil Co.* standards authorize the type of 'independent review' Haslip's counsel described to the United States Supreme Court, and that the procedure that Court called 'meaningful and adequate' . . . is neither meaningful nor adequate."

581 So.2d at 426.

The Supreme Court of the United States in *Haslip* very well may have closed the door on that Court's further review of punitive damages awards, but I do not read that decision as having done so. I think that the Supreme Court of the United States may have been led to

believe that a type of "independent review" was occurring, when in fact it was not, and is not, occurring. In fact, state legislation seeking to regulate such awards is being declared unconstitutional. Therefore, I would grant the motion to stay, in order to allow this litigant to present to the Supreme Court of the United States its claim that the Alabama procedure as applied, since *Haslip,* is not "meaningful and adequate."

Supreme Court, U.S.
FILED
APR 29 1996
CLERK

(2)

No. 95-1477

In The

Supreme Court of the United States

October Term, 1995

WILLIAM J. SCHULTE, M.D., *et al.*,

Petitioners,

versus

WOODROW SMITH,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER THE LOWER COURTS' REVIEWS OF THE JURY'S WRONGFUL DEATH AWARD COMPORTED WITH DUE PROCESS?

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STATEMENT OF THE CASE

Although the facts concerning liability are irrelevant to the issues raised by the petition, Petitioners have grossly distorted the actual evidence submitted at trial. Respondent thus feels compelled to recite enough of the facts to inform the Court of the bases for the decisions rendered by the courts below.

A. Factual Background

On September 28, 1989, Respondent's wife, Mrs. Annie Jo Smith, was admitted to Knollwood Park Hospital in Mobile, Alabama for severe injuries arising out of an automobile accident. [Pet. App. at 2]. Two days after her admission, Petitioner, Dr. Schulte, decided to place Mrs. Smith on a ventilator, which was achieved by internally inserting an endotracheal tube and connecting the tube to a mechanical ventilator. [Pet. App. at 2]. No emergency existed when Dr. Schulte made this decision. [R-229,234,244]. Dr. Schulte decided to perform the intubation because Mrs. Smith was becoming tired from breathing approximately 40 times a minute, and he believed the mechanical ventilator would "do the work for her," allowing her to rest. [R-229,234,244].

First, while trying to insert a Swan-Ganz catheter, Dr. Schulte penetrated Mrs. Smith's right lung, causing it to collapse. [R-267]. Between 9:05 a.m. and 9:15 a.m., Dr. Schulte began inserting an endotracheal tube into Mrs. Smith's mouth. [Pet. App. at 2]. The evidence established that Dr. Schulte placed the endotracheal tube down Mrs. Smith's esophagus (stomach), rather than her trachea, thereby cutting her airway off from the only source of oxygen available to her. [R-245-46,479-80]. Mrs. Smith immediately began to physically struggle and resist the intubation. [Pet. App. at 2].

Although the standard of care required him to do so, Dr. Schulte did *not* check Mrs. Smith's lungs and stomach by stethoscope to ensure the proper placement of the tube, until after Mrs. Smith suffered a full cardiac arrest.

[R-26-61;483;489]. The evidence established that Dr. Schulte deviated from the standard of care when he "failed to timely identify and correct the esophageal intubation before it led to a significant anoxic event that affected both the heart and the brain." [R-489]. Mrs. Smith's death on October 4, 1989, was proximately caused by Dr. Schulte's placement of the endotracheal tube into Mrs. Smith's esophagus instead of her lungs. [R-497].

The evidence at trial also revealed that Dr. Schulte ordered the administration of the drug *Pavulon* to paralyze Mrs. Smith during the intubation (in order to control her combativeness), but this did nothing to alter her mental state, so that she was conscious during this entire procedure. [R-480]. As a result of the esophageal intubation while she was paralyzed, Mrs. Smith was "aware that she was smothering to death until the time – until such time as her brain became so anoxic that it destroyed her knowledge of what was going on around her." [R-480]. In other words, Mrs. Smith knew she was smothering and could do nothing about it.

Although Petitioners now contend that the tube "came out of the trachea and dropped back into the esophagus" during the struggle (Pet. at 4), Dr. Schulte testified at trial that he held the tube at Mrs. Smith's lips at 22 centimeters during the entire course of events and that he did not feel the tube move up and down at any time.[1] [R-316; R-319].

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[1] The evidence at trial revealed that if Dr. Schulte was holding the tube at 22 centimeters, and if the tube was placed in the trachea, the tube would have been two and a half inches below where the trachea and esophagus separate. [R-316]. Therefore, in order for the tube to have moved from the trachea into the esophagus, as Petitioners now allege, the far end of the tube would have had to move up the trachea two and a half inches and then back down into the esophagus while the other end remained stationary! [R-319]. The evidence established that such a scenario would be impossible without the treating doctor noticing movement at the patient's lips. [R-517].

Although Petitioners claim that "Dr. Schulte immediately removed the old tube and placed a new tube" once he saw gastric contents rising in the tube (Pet. at 4), the evidence at trial revealed that Dr. Schulte's second attempt at intubation was below the standard of care as well. [R-489]. In his second attempt to intubate Mrs. Smith, Dr. Schulte placed the tube so far down the trachea that it moved into the left main stem bronchus. [R-308]. Because of this misplacement of the tube, although oxygen was being pushed into Mrs. Smith's left lung, no oxygen was being pushed into Mrs. Smith's right lung. [R-309]. After discovering the problem with the second intubation, it took Dr. Schulte two attempts to pull the tube back far enough that the oxygen was reaching both lungs. [R-312-13]. "It was a period of at least ten minutes, perhaps longer, before the tube was actually repositioned in the trachea so that both lungs were receiving the oxygen." [R-499]. The evidence established that Dr. Schulte's breaches of the standard of care on the second intubation had a causal effect on Mrs. Smith's death because they increased the time during which her oxygen levels were so low that she was not receiving a sufficient amount of oxygen to her brain. [R-498].

Finally, contrary to Petitioners suggestions, Mrs. Smith's injuries from the automobile accident were definitely "survivable" (R-500), and Mrs. Smith did *not* die from ARDs. [R-501-12]. The evidence at trial was "that the ARDs that [Mrs. Smith] developed was significant, but showed definite signs of improving", and was "a survivable condition were it not for the anoxic brain damage." [R-515].

B. Course of Proceedings Below

Immediately after Mrs. Smith's anoxic event, Dr. Schulte openly confessed to respondent and his family

that he had improperly placed the tube in the esophagus and then failed to promptly correct the situation. Shortly thereafter, Mr. Smith filed a wrongful death action under Alabama's Wrongful Death Act. After receiving the summons and complaint, Dr. Schulte notified his insurer, Mutual Assurance, Inc., of the lawsuit. [Schulte Post-Judgment Depo. at 10]. Thereafter, Dr. Schulte met with an adjuster from Mutual Assurance and informed him that "the tube had been found in the wrong place, and that contributed to her demise." [*Id.* at 11]. Dr. Schulte also informed the adjuster that the misplaced tube "was a significant factor in the death of this woman." [*Id.*]

Once discovery established that Dr. Schulte's failure to properly place the tube resulted in Mrs. Smith's brain death, Mr. Smith's counsel made a written demand for settlement in the amount of $2.5 million. [Ex. 1 to Schulte Depo.] After receiving this letter, Dr. Schulte met with his counsel and demanded that Mutual Assurance settle the case "for the policy limit." [Schulte Depo. at 14]. Mutual Assurance, however, refused to settle the case. A month before trial, Mr. Smith's counsel made another offer to settle the case, this time for policy limits. Dr. Schulte, once again, on behalf of himself and Pulmonary Associates, demanded that Mutual Assurance settle the case for policy limits. [Schulte Depo. at 17, 19; Ex. 4]. Mutual Assurance, once again, refused to settle the case. [*Id.* at 7]. Dr. Schulte informed Mutual Assurance that if it wanted to gamble on the verdict, he expected Mutual Assurance to pay any verdict in excess of his policy limits. [Schulte Depo. at 27].

After a seven-day trial, the jury assessed $4.5 million in punitive damages against Petitioners for Mrs. Smith's wrongful death. [C-1068].[2]

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[2] Under Alabama's wrongful death statute, punitive damages are the only type of damages which may be awarded. This Court approved of Alabama's Act in *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 47 S. Ct. 509, 71 L. Ed. 952 (1927).

Immediately following the jury's verdict, Petitioners each retained the services of a separate lawyer (i.e., not counsel hired by their insurer, Mutual Assurance) to represent their personal interests. [C-675 (notice of appearance); C-682 (same); R-1141; R-1204]. During post-judgment discovery, Dr. Schulte testified that, in the event the judgment ultimately exceeded the limits of coverage, he and Pulmonary Associates intended to pursue negligent-failure-to-settle claims against Mutual Assurance. [Schulte Depo. at 65-66].

After post-judgment hearings, the trial court declared Alabama Code Section 6-5-547 constitutional. [Pet. App. at 62-69]. The trial court also denied Petitioners' motions for JNOV, new trial, and/or remittitur, finding that "[t]he record contain[ed] a superabundance of evidence that Dr. Schulte's neglect of his esophageal intubation of Mrs. Smith was fatal and inexcusable." [Pet. App. at 54].

Mr. Smith timely appealed the portion of the trial court's judgment denying his motion to declare Section 6-5-547 unconstitutional. [C-1072]. Petitioners, in turn, cross-appealed from the portion of the trial court's judgment denying their post-judgment motions for a new trial, JNOV, and remittitur. [C-1077]. Importantly, Petitioners did *not* challenge the sufficiency of the evidence regarding liability on appeal.

On August 18, 1995, the Alabama Supreme Court declared the subject statute unconstitutional. [Pet. App. at 22]. While the Alabama Supreme Court found no trial errors (affirming the trial court's denial of Petitioners' Motions for New Trial and JNOV), the court conducted an independent review of the punitive damages verdict pursuant to *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991), and entered an order conditionally granting a new trial for excessiveness, unless Mr. Smith accepted a remittitur of the verdict from $4.5 million to $2.5 million.

[Pet. App. at 27]. On September 5, 1995, Mr. Smith filed notice of his acceptance of the remittitur.

REASONS FOR DENYING THE WRIT

ARGUMENT

I. NO COMPELLING REASONS EXIST FOR THIS COURT TO REVIEW THE ALABAMA SUPREME COURT'S DECISION IN *SMITH V. SCHULTE*

This Petition should be denied because the issues presented bear none of the characteristics deemed "compelling" under Supreme Court Rule 10. First, the review of the punitive damages verdict in this case comported in all respects with the procedure approved by this Court in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991). Second, this Court has long recognized that it is for the states to decide whether to retroactively apply decisions based on purely state law grounds. *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932). Finally, Petitioners' shrill attacks on Alabama Supreme Court Associate Justice Janie Shores are meritless, unfounded, and offensive. Justice Shores' refusal to recuse herself in the underlying appeal did not conflict with relevant decisions of this Court, nor with any decision of another state court of last resort or of a United States Court of Appeals.

A. No Compelling Reasons Exist For This Court To Review The Alabama Courts' Post-Judgment Reviews Of The Jury's Award In *Smith v. Schulte*

In *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991), this Court found that Alabama's procedure for the post-judgment review of a jury's punitive damages award comported with the Due Process Clause. *Haslip*, 499 U.S. 23-24. Specifically, the *Haslip* Court found that the post-judgment standards created by the Alabama Supreme Court in *Hammond v. City*

of Gadsden, 493 So. 2d 1374 (1986), and *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (1989), ("the *Hammond/Green Oil* factors"), "impose[] a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages." *Id.* at 22. Importantly, however, contrary to Petitioners' repeated contentions (See Pet. at 8 n.4 & 9), *Haslip* never "mandated consideration of each and every element" enumerated as the *Hammond/Green Oil* factors nor mandated "an independent review by the appellate court that includes an analysis of comparable cases and a detailed substantive review." Instead, recognizing that it could not "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case" (*Haslip*, 499 U.S. at 18), the *Haslip* Court held that "[t]he standards [imposed through the *Hammond/Green Oil* post-judgment review] provide for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter." *Haslip*, 499 U.S. at 22. Stated another way, unlike Petitioners' insinuations, nothing about *Haslip* requires the Alabama courts tos exhaustively consider each *Hammond/Green Oil* factor sentence by sentence, line by line in every opinion they release which discuss punitive damages awards. Because the Alabama courts' post-judgment reviews in the present case comported with *Haslip*, this Court has no compelling reason to grant certiorari.

B. No Compelling Reasons Exist For This Court To Review The Alabama Supreme Court's Retroactive Application of *Smith v. Schulte*

In *Smith v. Schulte*, the Alabama Supreme Court held that Alabama Code Section 6-5-547 violated the Alabama Constitution of 1901. The court's decision was based exclusively on state law. Because state courts have the authority to determine the retroactivity of their own decisions when questions of state law are at issue, Petitioners' retroactivity argument presents nothing for this Court to

review. *American Trucking Ass'n, Inc. v. Smith*, 496 U.S. 167, 177, 110 S. Ct. 2323, 110 L. Ed. 2d 148 (1990) (citing *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932)) ('We think the federal constitution has no voice upon the subject [of whether a state court may decline to give its decisions retroactive effect]').

C. No Compelling Reasons Exist For This Court To Review Justice Shores' Refusal To Recuse Herself

The opinions Justice Janie Shores expressed in her law review article do not require recusal based on constitutional grounds. The outcome of the appeal in this case was controlled by the Alabama Supreme Court's earlier decision in *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991).[3] Justice Shores' concurrence in *Moore predated* publication of her law review article. Because the court's decision in the present case was decided in light of the court's previous decision in *Moore*, Justice Shores' article had no affect on the court's decision. Moreover, even under an "appearance of impartiality" argument, Justice Shores' expressions of opinions did not come close to rising to the level of "extreme bias or prejudice" to merit disqualification under the Due Process Clause. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821, 106 S. Ct. 1580, 89 L. Ed. 2d 823, 832 (1986) ("[O]nly in the most extreme of cases would disqualification [based on allegations of bias or prejudice] be constitutionally required [under the Due Process Clause].").

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[3] *Moore* declared unconstitutional another "tort reform" statute which imposed a $400,000 cap on non-economic damages in medical malpractice cases.

D. This Petition Should Not Be Granted Under The Guise Of *BMW of North America, Inc. v. Gore*

This Court's decision in *BMW of North America, Inc. v. Gore*, ___ U.S. ___, 115 S. Ct. 932, 130 L. Ed. 2d 879 (1995), will not control the present case. In *Gore*, this Court granted certiorari to examine whether the punitive damage award violated due process because it was "grossly excessive" in light of *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 997, 113 S. Ct. 2711, 125 L. Ed. 2d 366, 378-79 (1993). In the present case, Petitioners do not contend that the wrongful death jury award in this case was "grossly excessive" anywhere in their petition, but, instead, ask this Court to review Alabama's post-judgment review in light of *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991). Therefore, *Gore* has no bearing on this petition.

II. THE ALABAMA SUPREME COURT'S DECISION IN *SMITH V. SCHULTE* DID NOT VIOLATE THE DUE PROCESS CLAUSE

Even if this Court decides to hear this case, the decision below will ultimately be affirmed because the Alabama Supreme Court's decision did not violate the Due Process Clause.

A. The Alabama Courts' Reviews Of The Jury's Wrongful Death Award Did Not Violate The Due Process Clause

1. The Alabama Courts' Reviews Comported With *Haslip*

The Alabama courts' reviews of the jury's wrongful death award in *Smith v. Schulte* did not violate the Due Process Clause. In *Haslip*, this Court refused to establish a mathematical bright line test for determining when a punitive damages award violates the Due Process Clause, observing instead that "the general concerns of reasonableness and adequate guidance from the court when

the case is tried to a jury properly enter into the constitutional calculus." *Id.* at 18. In light of those general concerns of reasonableness, *Haslip* approved Alabama's post-judgment procedure for reviewing punitive damages awards, essentially finding that meaningful review of the types of factors enumerated in *Hammond* and *Green Oil* assured procedural protection:

> "Pacific Mutual thus had the benefit of the full panoply of Alabama's procedural protections. The jury was adequately instructed. The trial court conducted a post-verdict hearing that conformed with Hammond. The trial court specifically found that the conduct in question 'evidenced intentional malicious, gross, or oppressive fraud,' App to Pet for Cert A14, and found the amount of the award to be reasonable in light of the importance of discouraging insurers from similar conduct, id., at A15. Pacific Mutual also received the benefit of appropriate review by the Supreme Court of Alabama. It applied the Hammond standards and approved the verdict thereunder. ***It brought to bear all relevant factors recited in Hornsby.***"

Id. at 23 (emphasis added).

In the present case, the jury was adequately instructed with regard to Alabama's Wrongful Death Act. Moreover, both the trial court and the Alabama Supreme Court reviewed the jury's wrongful death award in light of the *Hammond/Green Oil* factors. [Pet. App. at 51-62; 22-27 (respectively)]. After it "considered all of those factors that [were] *relevant*" (Pet. App. at 23), the Alabama Supreme Court remitted the jury's wrongful death award by $2 million. [Pet. App. at 27]. Because the jury's instructions combined with the post-judgment reviews by the trial court and Alabama Supreme Court "impose[d] sufficiently definite and meaningful constraint on the discretion of [the jury in this wrongful death case]," Petitioners were afforded all of the procedural protections guaranteed by the Due Process Clause.

Although Petitioners contend that "the excessiveness reviews conducted by both the trial court and the Alabama Supreme Court in this case fail to meet the requirements of *Haslip*," (Pet. at 9), the trial court's detailed order and the Alabama Supreme Court's opinion unequivocally show that both courts conscientiously reviewed the jury's wrongful death verdict in light of all of the relevant *Hammond/Green Oil* factors. [Pet. App. at 51-62; 22-27 (respectively)]. Specifically, the trial court conducted lengthy hearings wherein the parties were given an unlimited opportunity to present their arguments and evidence on the constitutional and *Hammond/Green Oil* issues.[4] At the close of these hearings, the trial court asked the parties for assistance in preparing an order reflecting its rulings denying Petitioners' post-judgment motions and Mr. Smith's motion to declare § 6-5-547 unconstitutional. The trial court then meticulously and repeatedly edited the parties' proposed orders. Specifically, the trial court separated its *Hammond/Green Oil* review into four categories and considered: (1) "the severity of defendants' conduct" (Pet. App. at 54-55); (2) "impact of verdict if not remitted" (Pet. App. at 55-56); (3) "mitigating factors" (Pet. App. at 56); and (4) "comparative analysis with other cases" (Pet. App. at 56-61). This carefully drafted order reflects a sober and thoughtful analysis in line with Hammond/Green Oil and "meaningful review" in accord with *Pacific Mutual Life Ins. Co. vs. Haslip*, 499 U.S. 1 (1991). Thus, defendants' due process rights were safeguarded by the trial court, and the verdict does not exceed the amount necessary to punish and deter.

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[4] The trial court conducted *four* post-judgment hearings on the constitutional and *Hammond/Green Oil* issues – April 20, 1993 (R-1141-64); April 23, 1993 (R-1164-1223); April 30, 1993 (R-1224-1234); and November 5, 1993 (R-1235-76).

On appeal, the Alabama Supreme Court conducted an independent review of the jury's wrongful death verdict and "considered all of [the *Hammond/Green Oil*] factors that [were] relevant." [Pet. App. at 23]. Although the Alabama Supreme Court did not explicitly recite every *Hammond/Green Oil* factor it considered, the court discussed three specific factors which it considered particularly influential in its review. [Pet. App. at 23-27]. Most importantly, two of the three factors discussed by the court were ***mitigating factors***: (1) "attempts at concealment or cover-up" and (2) "financial impact of the verdict." [Pet. App. at 25-27].

When examined in light of the trial court's findings, the Alabama Supreme Court's conclusion regarding Dr. Schulte's "candor" is an excellent example of how the court did, in fact, conduct an independent appellate review of the verdict in light of the *Hammond/Green Oil* factors. During its post-judgment review of the verdict, the trial court held that one factor supporting its refusal to remit the verdict was that Petitioners' misconduct was "reprehensible in the extreme." [Pet. App. at 54]. One basis for this conclusion was the trial court's belief that the jury could have concluded that Petitioners lacked candor at trial. [Pet. App. at 54]. The court found:

> "Further, while Dr. Schulte made damning admissions to Mrs. Smith's husband and daughter during the 24-hour period following Mrs. Smith's death, these episodes of contrition and candor were as fleeting as they were telling. During the trial itself, Dr. Schulte and his witness were so impeached that the jury reasonably could have concluded that the defendants were obsessed with self preservation, untempered by any remaining sense of contrition, to the utter exclusion of any duty of candor."

[Pet. App. at 54]. On appeal, the Alabama Supreme Court considered Dr. Schulte's admissions within three hours after the surgery to the Smiths that "he had misplaced the endotracheal tube and that he had failed to discover the

error for several minutes," as well as his express notations in the medical chart of the misplacement of the endotracheal tube, "a significant countervailing factor." [Pet. App. at 25]. This contrast between the trial court's and the Alabama Supreme Court's conclusions regarding Petitioners' candor demonstrates that the Alabama Supreme Court, in keeping with *Haslip*, conducted an independent review of the jury's wrongful death verdict, rather than "rubber stamping" the trial court's post-judgment order and, therefore, afforded Petitioners with due process protection as well.

2. Alabama's Post-Judgment Review, In Light Of A Presumption Of Correctness, Does Not Violate Due Process

"Assuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrebuttable." *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 997, 113 S. Ct. 2711, 125 L. Ed. 2d 366, 378-79 (1993). This Court has already held in *Haslip* that Alabama's post-judgment review procedures are fair. *Haslip*, 499 U.S. at 22. Therefore, under *TXO*, Alabama's post-judgment review procedures, in light of a presumption of correctness, do not violate due process.

Petitioners incorrectly argue that "Alabama's review contemplates letting the award stand unless it is so excessive as to be the result of bias, passion, prejudice or other improper motive." [Pet. at 16 (citing *Gulf Atl. Life Ins. Co. v. Barnes*, 405 So. 2d 916, 925 (Ala. 1981)]. Actually, although a punitive damages award in Alabama may be deemed excessive if it is "tainted by bias, passion, prejudice, or other improper motive," Alabama law also recognizes that a jury's award of punitive damages may be excessive *despite a lack of* bias, passion, prejudice, or other improper motive. In fact, in *Green Oil*, the Alabama Supreme Court explained:

> "This Court has recognized, however, that even though a jury verdict may not be excessive because it is the result of an improperly functioning jury, it is possible for a verdict to be excessive even when it is the result of a properly functioning jury. For example, in assessing punitive damages, the jury is not allowed to consider the financial position of the defendant. The defendant's financial position is, however, a consideration essential to a post-judgment critique of a punitive damages award. Bearing in mind that punitive damages must not exceed an amount that will accomplish society's goals of punishment and deterrence, it is possible for a jury to hear the evidence in the case, make findings of fact, correctly apply the law, and still, albeit unwittingly, assess damages that bear no reasonable relationship to the accomplishment of those goals."

Green Oil Co. v. Hornsby, 539 So. 2d 218, 222 (Ala. 1989) (citations omitted). Therefore, in Alabama, a jury's award of punitive damages may be excessive as a matter of law in two ways: " '1) the jury's decision-making process was tainted by bias, passion, prejudice, or other improper motive; ***or*** 2) the verdict goes beyond that necessary to accomplish society's goals of punishment and deterrence.' " *Continental Eagle Corp. v. Mokrzycki*, 611 So. 2d 313, 321 (Ala. 1992) (emphasis added) (quoting *Killough v. Jahandarfard*, 578 So. 2d 1041, 1046 (Ala. 1991)). In other words, under Alabama law, a reviewing court will, if asked by the defendant, review the jury's award under *two separate standards*: 1) under the "bias, passion, prejudice, or other improper motive" standard **and** 2) under the "goes beyond that necessary to accomplish society's goals of punishment and deterrence" standard in light of the *Hammond/Green Oil* factors. *See Green Oil*, 539 So. 2d at 222-24. In short, contrary to Petitioners' arguments, a punitive damages verdict will be remitted on the grounds of excessiveness, even if the reviewing court finds that

the verdict is not the result of "bias, passion, prejudice, or other improper grounds," if the reviewing court finds that the award "goes beyond that necessary to accomplish society's goals of punishment and deterrence."

Moreover, Petitioners misconstrue Alabama's post-judgment review procedures when they conclude that "Alabama's excessiveness standard identifies the *most* egregious conclusion the jury could have reached from the evidence or the inferences therefrom and, ignoring the totality of the evidence, uses that standard as its benchmark for excessiveness," because "Alabama's review contemplates letting the award stand unless it is so excessive as to be 'plainly and palpably wrong and unjust.' " [Pet. at 16 (citing *Continental Eagle Corp. v. Mokrzycki*, 611 So. 2d 313, 322 (Ala. 1992))]. The "plainly and palpably wrong and unjust" standard cited by Petitioners applies to a defendant's challenge of a jury verdict *on sufficiency of the evidence grounds.*[5] *Continental Eagle Corp. v. Mokrzycki*, 611 So. 2d 313, 321 (Ala. 1992) ("We may not reverse the judgment, based on a jury verdict, on the grounds that the evidence was insufficient unless that evidence, when viewed in a light most favorable to [plaintiff], indicates that the verdict was 'plainly and palpably wrong and unjust.' "). The "plainly and palpably wrong and unjust" standard does *not*, however, apply when a party argues that a jury's punitive damages verdict "goes beyond that necessary to accomplish society's goals of punishment and deterrence." Such a challenge, instead, is examined in light of the *Hammond/Green Oil* factors. Because the "plainly and palpably wrong and unjust" standard does not apply to *Hammond/Green Oil*

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[5] In their cross-appeal to the Alabama Supreme Court, Petitioners did *not* raise any sufficiency of the evidence objections to the jury's $4.5 million verdict. Likewise, defendants did *not* contend that the jury's verdict was tainted by bias, passion, prejudice, corruption or any other improper motive or cause.

post-judgment reviews, Petitioners' supposition that Alabama's excessiveness standard uses the most egregious conclusion the jury could have found as its benchmark for excessiveness is wholly without merit.

In sum, Alabama's post-judgment procedure for review of punitive damages awards "provides the defendant with fundamental fairness while at the same time allowing society to perpetuate the punishment and deterrence of unacceptable conduct." *Killough v. Jahandarfard*, 578 So. 2d 1041, 1045-46 (Ala. 1991). In its own due process review of its procedures, the Alabama Supreme Court has explained:

> "In 'an abundance of concern for the preservation and protection of a defendant's constitutional right to due process,' *Pacific Mutual Life Ins. Co. v. Haslip*, 553 So. 2d 537 (Ala. 1989), this Court has created the *Hammond* post-verdict procedure. By the *Hammond* procedure, the civil defendant is protected in two ways: 'First, a requirement of "reasonableness, of proportionality, of sensible relation between punishment and offense," and, second, a guarantee of "not just bare survival, but continued productive economic viability," '; 'due process mandates at all times, in all circumstances, and for all defendants, "fundamental fairness" at the hands of the law.' C. Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 156, 151-52, as quoted in *Industrial Chemical*, 547 So. 2d at 838, 835. The mandates of due process within the punitive damages context also require a balance between the due process rights of the plaintiff and those of the defendant. *Id.* at 835. This is the goal of *Hammond* – a balance of rights for both plaintiff and defendant."

Killough, 578 So. 2d at 1045.

B. Due Process Did Not Require Pure Prospective Application

"When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions. See *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932) ('We think the federal constitution has no voice upon the subject [of whether a state court may decline to give its decisions retroactive effect]')." *American Trucking Ass'n, Inc. v. Smith*, 496 U.S. 167, 177, 110 S. Ct. 2323, 110 L. Ed. 2d 148 (1990). In the present case, the Alabama Supreme Court declared Alabama Code Section 6-5-547 unconstitutional under the Alabama Constitution of 1901. [Pet. App. at 5; 17-18; 21 ("Moreover, because Smith does not challenge § 6-5-547 under any provision of the United States Constitution, our analyses and conclusions are based entirely on adequate and independent state law grounds.")]. Because the issues involved in *Smith v. Schulte* were exclusively state law issues, the Alabama Supreme Court had the authority to determine the retroactivity of its decision. Therefore, the Alabama Supreme Court's decision to declare the statute inoperative as if it had never been enacted is a matter of state law which this Court has no authority to review.

Even if, assuming *arguendo*, the Alabama Supreme Court's decision must be reviewed in light of the Due Process Clause, due process does not mandate a purely prospective application. In fact, this Court has infrequently resorted to pure prospectivity. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 536, 111 S. Ct. 2439, 115 L. Ed. 2d 481, 488 (1991). Moreover, even under the three-part test enumerated in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), the Alabama Supreme Court was not required to apply its decision in *Smith v. Schulte* purely prospectively.

First, the Alabama Supreme Court's decision in *Smith v. Schulte* was an issue of first impression which *was* clearly foreshadowed. From the moment it was enacted

into law, the constitutional validity of Section 6-5-547 was the subject of serious debate. *See*, Worel, *The Alabama Medical Liability Act of 1987 – Can it Withstand Judicial Scrutiny?*, Ala. Trial Law. J. (Fall, 1987); Worel, *The Alabama Medical Liability Act of 1987 – Can it Withstand Judicial Scrutiny? Part II*, Ala. Trial Law. J. (Summer, 1988); Nelson, *Tort Reform In Alabama: Are Damages Restrictions Unconstitutional?*, 40 Ala. L. Rev. 533 (1989). Also telling, the only other tort reform damages cap contained in Alabama's Medical Liability Act of 1987 was declared unconstitutional in 1991. *Moore v. Mobile Infirmary Association*, 592 So. 2d 156 (Ala. 1991).

Second, prior to the enactment of Section 6-5-547, health care providers who were sued for the wrongful death of their patients did not enjoy any special protection from an award in excess of $1 million. The court's decision in *Smith v. Schulte* was its first opportunity to consider the validity of the statute. If the court had applied its decision declaring the statute invalid purely prospectively, it would have furthered the operation of a constitutionally infirm statute for the benefit of some medical malpractice defendants, but not others. This result is inequitable and impermissible.

Most importantly, there is no danger that the court's decision in *Smith v. Schulte* will produce "substantial inequitable results" by retroactive application. First, the court's retroactive application of *Smith v. Schulte* is consistent with other Alabama Supreme Court opinions which declared statutory caps unconstitutional. *See, e.g., Moore v. Mobile Infirmary Association*, 592 So. 2d 156 (Ala. 1991) (in striking down the $400,000 cap on non-economic damages imposed by Alabama Code Section 6-5-544(b), the court made no mention of any limitation on retroactive application of its ruling); *Henderson v. Alabama Power*, 627 So. 2d 878, 894 (Ala. 1993) (in striking down the $250,000 cap on punitive damages, the court remanded the case with instructions to the trial court "to reinstate

the full amount of the verdict").[6] Second, as stated above, the constitutional validity of § 6-5-547 has been the

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[6] The Alabama Supreme Court's decision is also consistent with other state courts. In *McGuire v. C & L Restaurant Inc.*, 346 N.W.2d 605 (Minn. 1984), for example, the Minnesota Supreme Court held that the damage cap limiting liability of a vendor to $250,000 for all damages to one person arising out of a single instance of the illegal sale and barter of an intoxicating liquor unconstitutionally deprived the motorcyclist of equal protection of the laws. Rejecting the same retroactivity argument defendants raised in the instant case, the Minnesota Supreme Court held:

> "Finally, respondent argues that in the event of our holding the 'damage cap' of section 340.95 unconstitutional, the rule of unlimited liability of intoxicating liquor vendors should apply prospectively only. Respondent relies on *Spanel v. Mounds View School District No. 621*, 264 Minn. 279, 118 N.W.2d 795 (1962). There we abrogated the substantive tort law that sovereign immunity was a defense available to state subdivisions, but we made the ruling prospective because the school district had relied upon the existence of the immunity defense and had not had the opportunity to secure liability insurance. In so doing, this court recognized an exception to the general rule providing that when the court prospectively overrules a rule of law, the new rule is applied to the case before the court and to claims arising after the date of the overruling decision. *Beaudette v. Frana*, 285 Minn. 366, 173 N.W.2d 416 (1969); *Silesky v. Kelman*, 281 Minn. 431, 161 N.W.2d 631 (1968); *Balts v. Balts*, 273 Minn. 419, 142 N.W.2d 66 (1966). See generally Note, *The Retroactivity of Minnesota Supreme Court Personal Injury Decisions*, 6 Wm. Mitchell L.Rev. 179 (1980). Assuming that respondent had obtained insurance coverage only to the statutory limit, a fact we do not know, undoubtedly there is the appearance of injustice because the legal ramifications of its action were unpredictable at the time of purchase. However,

subject of serious debate from the moment it was enacted into law. The incident which gave rise to this cause of action occurred in 1989. Petitioners and their insurer have known of the very real possibility that the statute would be declared unconstitutional and therefore could not legitimately rely on the cap. Moreover, Dr. Schulte testified that he did *not* purchase a liability insurance policy with limits of $1,000,000 because of the cap. Instead, "when I came to town and started working, that's what everybody I worked with had, and that was pretty much the accepted limits in town." [Schulte Post-Judgment Depo. at p. 37].

To the extent Petitioners did rely on the cap, they did so at their peril, particularly since the Alabama Supreme Court had already declared unconstitutional the only other damages cap contained in the Medical Liability Act nearly two years before the instant case even went to trial. *See, supra*. Moreover, as Dr. Schulte admitted in his deposition, Petitioners were aware of Mr. Smith's challenge to the constitutionality of Section 6-5-547 in this case long before the case went to trial. [Ex. 5 to Schulte

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> the same could be said of the defendants in the cited cases. Moreover, ***prospectively declaring the 'damage cap' unconstitutional would ignore the law's policy of providing incentive for challenging unconstitutional statutes***. *Wegan*, 309 N.W.2d at 283 (Amdahl, J., concurring specially). ***Finally, if the court finds a statute unconstitutional, the statute is not a law; it is just as inoperative as if it had never been enacted***. *See State v. One Oldsmobile Two-Door Sedan*, 227 Minn. 280, 35 N.W.2d 525 (1948); *Gamble-Robinson Co. v. Pennsylvania Railroad Co.*, 157 Minn. 306, 196 N.W. 266 (1923). Therefore, it follows that our decision that the 'damage cap' is unconstitutional precludes our holding that this ruling should be applied only prospectively."

Id. at 611 (emphasis added).

Post-Judgment Depo]. Finally, each Petitioner has its own policy of insurance with limits of $1 million.

Due process, therefore, did not require the court to prospectively apply its decision.

C. Justice Shores' Refusal To Recuse Herself Did Not Violate The Due Process Clause

Justice Janie Shores'[7] participation in the Alabama Supreme Court's decision did not violate Petitioners' Fourteenth Amendment right to a fair tribunal. Although state statutes and/or judicial canons may permit recusal for personal bias or prejudice, bias or prejudice "alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820, 106 S. Ct. 1580, 89 L. Ed. 2d 823, 832 (1986). "[O]nly in the most extreme of cases would disqualification [based on allegations of bias or prejudice] be constitutionally required [under the Due Process Clause]." *Lavoie*, 475 U.S. at 821 (1986). Justice Shores' opinions expressed in her law review article, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 Ala. L. Rev. 61 (1992), do not indicate any bias or prejudice on her behalf against the Petitioners, much less rise to the level of extreme bias or prejudice as alleged by Petitioners. Therefore, due process did not require Justice Shores to recuse herself.

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[7] Justice Janie Shores is one of the most highly respected state court supreme court justices in the country. Prior to her election to the court in 1974, Justice Shores served as a law clerk to the late Alabama Supreme Court Justice Robert T. Simpson, as a member of the legal staff of Liberty National Life Insurance Company, and as a professor of law at Cumberland School of Law. Most recently, Justice Shores is a faculty member of the prestigious group of 24 appellate judges for the 10th Appellate Practice Institute which will be held May 17-19, 1996, in Washington, D.C. She is literally known as a leading citizen of our state. Her reputation and character are beyond reproach.

Most importantly, Justice Shores' article was written *after* the Alabama Supreme Court's decision in *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991).[8] In *Moore*, a plurality concluded that a statutory cap which limited non-economic loss in medical malpractice cases to $400,000 violated medical malpractice plaintiffs' rights to equal protection under the Alabama Constitution. *Moore*, 592 So. 2d at 168-69. In reaching its decision in *Moore*, the Alabama Supreme Court examined a seminal study conducted by the United States General Accounting Office ("GAO") and two other studies directly addressing the effects of medical malpractice tort reform[9] and concluded that "the correlation between the damages cap imposed by § 6-5-544(b) and the reduction of health care costs to the citizens of Alabama is, at best, indirect and remote." *Id.* at 168.

In the present case, the Alabama Supreme Court adopted *Moore's* statistical analysis to conclude that the $1 million cap in wrongful death actions against health care providers violated the equal protection guarantee of the Alabama Constitution.[10] [Pet. App. at 16-17]. In short,

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[8] Justice Shores cited *Moore v. Mobile Infirmary Ass'n* in her article. Justice Janie L. Shores, *A Suggestion For Limited Tort Reform: Allocation Of Punitive Damage Awards To Eliminate Windfall*, 44 Ala. L. Rev. 61, 86 n.149 (1992). Additionally, a brief synopsis of *Moore* was reported in the same volume of the Alabama Law Review that published Justice Shores' article. Recent Decision, *Statutory Damages Cap For Medical Malpractice Cases Found Unconstitutional*, 44 Ala. L. Rev. 263 (1992).

[9] Neither the "medical malpractice" GAO study nor the other two medical malpractice studies were discussed in Justice Shores' article.

[10] Specifically, after quoting *Moore's* entire statistical analysis discussion, the court explained:

> "The plurality's statistical analysis of § 6-5-544(b), which section formed part and parcel of the same 'tort reform package' as § 6-5-547, is equally

it was the *Moore* opinion, not Justice Shores' article, which controlled the Alabama Supreme Court's decision in *Smith v. Schulte*. Petitioners' contention that Justice Shores' "involvement in the opinion and judgment infected the decision against Petitioners with the taint of bias and prejudice in violation of due process" is therefore wholly without merit. [Pet. at 27].

Moreover, Justice Shores' article does not express any opinions regarding the medical malpractice statute challenged, the legislature's rationale for passing the legislation, or the constitutional issues (equal protection and right to trial by jury) raised by Mr. Smith on appeal. Instead, a complete reading of Justice Shores' article reveals that the sole purpose of her commentary is to offer a solution to the issue of whether the plaintiff should receive the punitive damages assessed by juries. After thoroughly evaluating the United States' punitive damages system and after presenting arguments and criticisms articulated by other commentators (both for and against punitive damages), Justice Shores contends that courts should allocate payment of such damages to persons or entities other than the plaintiff (such as a common fund for reducing the harm for which the defendant is found liable). Justice Shores' position therefore gives neither party any real advantage or disadvantage with the court with regard to an equal protection challenge.

Assuming, *arguendo*, that Justice Shores did have an opinion regarding the statutory cap for wrongful death recoveries against health care providers, the effect of her opinion was counteracted by the opinions of the other members of the court. All justices have opinions. It is

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applicable to this case, as are its conclusions regarding the inherent inequities of the damages cap.

"Indeed, the classifications created by § 6-5-547 are singularly bizarre and anomalous in view of the particular right of action to which the statute applies."

Pet. App. at 16-17.

impossible to create a viable judiciary that is void of such opinions. However, our society has created an effective judiciary by establishing panels which essentially balance several persons' understandings and opinions. As a member of the Alabama Supreme Court, Justice Shores was not the sole decision-maker in this case. Her opinions and decisions were combined with those of the other justices to reach a collective decision.[11]

Justice Rehnquist's opinion in *Laird v. Tatum*, 409 U.S. 824, 93 S. Ct. 7, 34 L. Ed. 2d 50 (1972), provides support for this position. In *Laird*, respondents moved to recuse Justice Rehnquist from participating in their case "because of testimony [he] gave on behalf of the Department of Justice before the Subcommittee on Constitutional Rights of the Judiciary Committee of the United States Senate at its hearings on 'Federal Data Banks, Computers and the Bill of Rights,' and because of other statements [he] made in speeches related to this general subject." *Laird*, 409 U.S. at 824. In refusing to recuse himself, Justice Rehnquist noted that "none of the former justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench." *Id.* at 831. In his research, Justice Rehnquist discovered that many justices sat in cases where they had previously (1) drafted the legislation challenged or interpreted in the case, (2) wrote extensively on issues presented to the Court, and/or (3) decided the exact same issue as Attorney General. *Id.* at 831-32; 835-36. Following this well-established precedent, Justice Rehnquist refused to disqualify himself.

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[11] In fact, four justices (Justice Ingram, Justice Shores, Justice Cook and Justice Kennedy) concurred with the per curiam opinion on the equal protection issue in *Smith v. Schulte*. Two other justices (Justice Almon and Justice Butts) concurred in the result regarding the equal protection issue.

In his opinion, Justice Rehnquist recognized the importance of the presumption against bias and the consequent duties of that presumption:

> "[O]ne's course of action may well depend upon the view he takes of the process of disqualification. Those federal courts of appeals which have considered the matter have unanimously concluded that a federal judge has a duty to *sit* where *not disqualified* which is just as strong as the duty to *not sit* where *disqualified*."

Id. at 837 (emphasis in original). Finding the "equal duty" concept even stronger in the case of a Justice of the Supreme Court of the United States, Justice Rehnquist noted the grave difficulties which can arise from unnecessary recusals:

> "There is no way of substituting Justices on this Court as one judge may be substituted for another in the district courts. There is no higher court of appeal which may review an equally divided decision of this Court and thereby establish the law for our jurisdiction. While it can seldom be predicted with confidence at the time that a Justice addresses himself to the issue of disqualification whether or not the Court in a particular case will be closely divided, the disqualification of one Justice of this Court raises the possibility of an affirmance of the judgment below by an equally divided Court. The consequence attending such a result is, of course, that the principle of law presented by the case is left unsettled. The undesirability of such a disposition is obviously not a reason for refusing to disqualify oneself where in fact one deems himself disqualified, but I believe it is a reason for not 'bending over backwards' in order to deem one's self disqualified."

Id. at 837-38 (citations omitted). As the court of last resort for Alabama, the Alabama Supreme Court had similar

objectives to bear in mind when it refused to disqualify Justice Shores.

Most importantly, Justice Rehnquist recognized that "neither the oath, the disqualification statute, nor the practice of the former Justices of this Court guarantee a litigant that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law." *Id.* at 838. Justice Rehnquist's reasoning is applicable in this case as well. Justice Shores' statements did not substantially support the presence of *any* bias or prejudice against *any* party on the issue of whether the statutory cap for wrongful death recoveries against health care providers was unconstitutional. Her recusal would not have, in any way, alleviated the petitioners' *alleged* danger. In fact, recusing Justice Shores would have only impeded her duty to decide the issue brought before her as an officer of the state judiciary. Such an action would have frustrated the notions of justice as they are embodied in our judiciary.

Citing *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986), Petitioners argue that Due Process mandates that the bench not display even an appearance of partiality. [Pet. at 26]. *Lavoie*, which defines the circumstances necessary for Due Process-based recusals, does not, however, require recusal in this case. In *Lavoie*, this Court addressed whether the Due Process Clause required the recusal of Justice Embry, who was a plaintiff in two separate cases against insurance companies, alleging, in both actions, bad-faith failure to pay a claim (the *Lavoie* case clarified Alabama's bad-faith law). *Lavoie*, 475 U.S. at 815, 817. Petitioner asserted two separate grounds for recusal: (1) "Justice Embry's general hostility towards insurance companies that were dilatory in paying claims, as expressed in his deposition," required his recusal under the Due Process Clause; and (2) Justice Embry had a direct stake in the outcome of the *Lavoie* case which

required his recusal under the Due Process Clause. *Id.* at 820, 821.

With regard to petitioners' claim that recusal was required because Justice Embry expressed a general hostility towards insurance companies, this Court refused to accept the insurer's argument that the justice's participation in the case, despite his general hostility toward insurance companies, violated the Due Process Clause.[12]

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[12] The Court recognized:

"[N]ot '[a]ll questions of judicial qualification . . . involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.' *Tumey v. Ohio*, 273 U.S. 510, 523, 71 L. Ed. 749, 47 S. Ct. 437, 5 Ohio L. Abs. 159, 5 Ohio L. Abs. 185, 50 ALR 1243 (1927); *see also FTC v. Cement Institute*, 333 U.S. 683, 702, 92 L. Ed. 1010, 68 S. Ct. 793 (1948) ('[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level'). Moreover, the traditional common-law rule was that disqualification for bias or prejudice was not permitted. *See, e.g., Clyma v. Kennedy*, 64 Conn. 310, 29 A. 539 (1894). *See generally* Frank, *Disqualification of Judges*, 56 Yale L.J. 605 (1947). As Blackstone put it, 'the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.' 3 W. Blackstone, Commentaries *361. The more recent trend has been towards the adoption of statutes that permit disqualification for bias or prejudice. *See Berger v. United States*, 255 U.S. 22, 31, 65 L. Ed. 481, 41 S. Ct. 230 (1921) (enforcing statute disqualifying federal judges in certain circumstances for personal bias or prejudice). *See also* ABA Code of Judicial Conduct, Canon 3C(1)(a) (1980) ('A judge should disqualify himself . . . where he has a personal bias or prejudice concerning a party'). But that alone would

Holding that "only in the most extreme cases would disqualification on this basis be constitutionally required," the Court found that Aetna's allegations of bias and prejudice based on Justice Embry's "general hostility" were "insufficient to establish any constitutional violation." *Id.* at 821.

Thus, a justice's bias was not considered to be "extreme" in a case where he had directly professed a frustration with a class of parties and where he had indicated that he had negative personal experiences with such parties. If such comments did not exhibit the "extreme" bias required for a constitutionally required recusal, then surely Justice Shores' prior comments and "conclusions" contained in a law review article did not require recusal based upon constitutional grounds.

Although Justice Embry's "general bias" in *Lavoie* was insufficient to establish a constitutional violation, he *was*, however, recused for having a direct stake in the outcome of the case, which *did* violate the Due Process Clause. Because Justice Embry had two cases pending in lower courts which would have been affected and bound by *Lavoie*, this Court held that Justice Embry should have been recused because he had a direct, personal, substantial pecuniary interest in the case which violated the Fourteenth Amendment and undermined the appearance of impartiality. *Id.* at 821.

Contrary to *Lavoie*, Justice Shores had no direct, personal, substantial pecuniary interest in the outcome of this litigation. Justice Shores was, therefore, not required to recuse herself on constitutional grounds.

In *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 98 (3d Cir. 1992), the Third Circuit ordered the recusal of a district court judge because of statements he made in an opinion regarding discovery issues raised by the defendant (the

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not be sufficient basis for imposing a constitutional requirement under the Due Process Clause."

Lavoie, 475 U.S. at 820.

tobacco industry). Specifically, in his discovery order, the trial judge in *Haines* accused the defendant tobacco industry of being "the king of concealment and disinformation." *Haines*, 975 F.2d at 97. The trial judge's accusations were prominently reported in the *New Jersey Star Ledger*, the *New York Times*, the *Wall Street Journal*, the *Washington Post*, the *Chicago Tribune*, and the *Los Angeles Times*. *Id.* at 97. In light of the judge's accusations and conclusions directed toward the defendant, the Third Circuit assigned the case to another district judge.

Contrary to *Haines*, Justice Shores did not make any negative, biased, or derogatory comments about Petitioners or about their class (defendant health care providers) in her article. In fact, Justice Shores did not mention the statute (Alabama Code Section 6-5-547) involved in *Smith v. Schulte* even once throughout her entire article. Instead, Justice Shores merely addressed the general arguments presented in the ongoing debate over punitive damages and discussed a possible solution to the "windfall" concern: alternative allocations of punitive damage awards.

In short, Justice Shores' comments and opinions contained in her article did not rise to the level of extreme bias or prejudice to constitutionally require her disqualification from participating in the *Smith v. Schulte* decision.

CONCLUSION

This Petition for Writ of Certiorari is born of nothing more than a medical malpractice insurer's refusal to seriously consider the defendant doctor's repeated requests that this wrongful death case be settled for an amount within the limits of his coverage. Dr. Schulte repeatedly admitted his fault in causing Mrs. Smith's death; nevertheless, his (and his group's) insurer insisted on presenting an aggressive defense at trial – one which no doubt backfired given the trial court's findings and the size of the verdict. The insurer's "deny and defend at any

cost" mentality resulted in a punitive damages verdict in excess of those coverage limits, and, now, the insurer faces a lawsuit for its refusal to settle.

When Petitioners' arguments on appeal were soundly rejected by the Alabama Supreme Court, Petitioners framed their state law issues in terms of violations of the federal constitution with the hope that this Court might find some connection with other Alabama punitive damages cases sufficient to warrant certiorari review. Contrary to Petitioners' representations, however, this case does not involve an outrageous verdict which was unsupported by the facts. Instead, as demonstrated above, the jury's verdict was amply supported by substantial evidence at trial, and Petitioners received all the constitutional protections they were due.

Accordingly, the Petition for Writ of Certiorari should be denied.

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